Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

BERETTA U.S.A. CORP., ET AL.,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

BERETTA U.S.A. CORP., ET AL.,

Petitioners,

v.

BRYANT LAWSON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A District of Columbia statute imposes liability "without regard to fault or proof of defect" on firearms manufacturers and distributors for injuries resulting from the use of a wide range of firearms discharged in the District, even though those firearms may not be manufactured or sold within the District, and even though any such injuries result from the intervening acts of criminals who illegally bring the firearms into the District and use them to cause harm.

The following questions are presented:

1. Whether the District's statute, which has the practical effect of deterring firearms manufacturers from making and selling their lawful products elsewhere in the country, violates the Commerce and Due Process Clauses of the United States Constitution, and contravenes basic principles of federalism.

2. Whether the Commerce Clause's *per se* ban on "direct regulation" of out-of-state commerce is limited to statutes explicitly regulating price or whether it applies to all types of extraterritorial regulation.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The plaintiffs below included the District of Columbia, Bryant Lawson, James Foster-El, Michelle Foster-El, Patrick Mahoney, Laura Wallace, Madilia Marsh-Williams, Gregory Ferguson, Ahmad Vaughan and Avery Blue.

The defendants below included Beretta U.S.A. Corp.; Browning Arms Co.; Century International Arms, Inc.; Colt's Manufacturing Co.; Fabbrica d'Armi Pietro Beretta S.p.A.; Forjas Taurus, S.A.; Glock Ges.m.b.H.; Glock, Inc.; Heckler & Koch, Inc.; Hi-Point Firearms; H&R 1871, Inc.; International Armament Corp. d/b/a Interarms Industries, Inc.; K.B.I., Inc.; Navegar, Inc. d/b/a Intratec; Norinco Sports U.S.A., Inc.; Phoenix Arms; Sigarms, Inc.; Smith & Wesson Corp.; Sturm Ruger & Co.; and Taurus International Manufacturing, Inc.

Pursuant to Supreme Court Rule 29.6, petitioners respectfully state as follows:

Beretta U.S.A. Corp. is majority owned by Beretta Holding S.p.A., and no publicly held company owns 10 percent or more of its shares.

Browning Arms Co. is wholly owned by Browning. No publicly held company owns 10 percent or more of its shares.

Century International Arms, Inc. has no parent corporation and no publicly held company owns 10 percent or more of its shares.

Colt's Manufacturing Co. LLC is wholly owned by New Colt Holding Corp., and no publicly held company owns 10 percent or more of its shares.

Fabbrica d'Armi Pietro Beretta S.p.A. is wholly owned by Beretta Holding S.p.A., and no publicly held company owns 10 percent or more of its shares.

Forjas Taurus, S.A. has no parent corporation and no publicly held company owns 10 percent or more of its shares.

Glock, Inc. has no parent corporation and no publicly held company owns 10 percent or more of its shares.

Heckler & Koch, Inc. is wholly owned by Suhl USA, Inc., which is in turn wholly owned by Suhl Holdings GmbH, a privately-held German corporation.

Hi-Point Firearms (a d/b/a of Beemiller, Inc.) has no parent corporation and no publicly held company owns 10 percent or more of its shares.

H&R 1871, Inc. has no parent corporation and no publicly held company owns 10 percent or more of its shares.

K.B.I., Inc. has no parent corporation and no publicly held company owns 10 percent or more of its shares.

Phoenix Arms has no parent corporation and no publicly held company owns 10 percent or more of its shares.

Sigarms, Inc. has no parent corporation and no publicly held company owns 10 percent or more of its shares.

Smith & Wesson Corp. is a wholly-owned subsidiary of Smith & Wesson Holding Corporation, which has issued shares to the public.

Sturm Ruger & Co. has no parent corporation and no publicly held company owns 10 percent or more of its shares.

Taurus International Manufacturing, Inc. is a wholly owned subsidiary of Taurus Holdings, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Beretta U.S.A. Corp.; Browning Arms Co.; Century International Arms, Inc.; Colt's Manufacturing Co.; Fabbrica d'Armi Pietro Beretta S.p.A.; Forjas Taurus, S.A.; Glock, Inc.; Heckler & Koch, Inc.; Hi-Point Firearms; H&R 1871, Inc.; K.B.I., Inc.; Phoenix Arms; Sigarms, Inc.; Smith & Wesson Corp.; Sturm Ruger & Co.; and Taurus International Manufacturing, Inc. respectfully petition this Court for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS AND ORDERS BELOW

The Court of Appeals' en banc opinion (Pet. App. 1a) is reported at 872 A.2d 633. The original panel opinion (Pet. App. 51a) is reported at 847 A.2d 1127. The order of the Superior Court (Pet. App. 95a) is not reported, but is available at 2002 WL 31811717.

JURISDICTION

The Court of Appeals filed its en banc opinion on April 21, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) and (b), and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The District of Columbia's "Assault Weapons Manufacturing Strict Liability Act" provides, in relevant part, that "[a]ny manufacturer, importer, or dealer of an assault weapon or machine gun shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault weapon or machine gun in the District of Columbia." D.C. Code § 7-2551.02.

The Commerce Clause of the Constitution of the United States, Art. I, § 8, cl. 3, grants Congress the power to "regu-

late Commerce with foreign Nations, and among the several States."

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case presents the question whether the District of Columbia may enact a statute with the practical effect of deterring petitioners from manufacturing and selling their lawful, nondefective products throughout the country.

1. The District of Columbia Council enacted the "Assault Weapons Manufacturing Strict Liability Act" (the "Act") effective February 1992. The Act, codified at D.C. Code §§ 7-2551.01 to 7-2551.03, imposes liability "without regard to fault or proof of defect" on firearms manufacturers and distributors for "all direct and consequential damages" arising from the discharge of certain firearms within the District of Columbia. In the words of the Act's sponsor, in introducing the statute's predecessor, "[t]his legislation will lead to far fewer handguns, not only in the district, but *in the nation as a whole*." Memorandum from David Clarke to members of D.C. Council (quoted in Pet. App. 172a (quotation marks and brackets omitted)).

The Act applies to "assault weapons" and "machine guns," but defines those terms to encompass virtually all semi-automatic firearms. *See* D.C. Code § 7-2551.01(1) (defining "assault weapon" to include certain enumerated firearms), § 7-2501(10) (defining "machine gun" to include "any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot: Automatically, more than 1 shot by a single function of the trigger [or] Semiautomatically, more than 12 shots without manual reloading"). In particular, the Act's definition of "machine gun" encompasses a wide array of semiautomatic firearms that are not normally considered "machine guns" and differs from the far narrower definition of the term under federal law. *See* 26

U.S.C. § 5845(b) (defining "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger"). The District of Columbia's broad definitions pull within the Act's coverage standard and widely used semi-automatic pistols, rifles and shotguns that are legal to make, sell and own in virtually every State in the nation.

Although the Act is entitled the "Strict Liability" Act, unlike traditional strict product liability statutes, it does not require a plaintiff to prove the existence of a defect or that the manufacturer was negligent or at fault in any way. Rather, liability is imposed "*without* regard to fault or proof of defect," thus rendering manufacturers absolutely and automatically liable for all injuries caused by the discharge of their firearms within the District of Columbia. D.C. Code § 7-2551.02 (emphasis added).

The Act allows for few exceptions to liability. Manufacturers are not liable for injuries caused by "assault weapons" to individuals engaged in a criminal act or who injure themselves, and are not liable for injuries caused by "assault weapons" that were "originally distributed to a law enforcement agency or . . . officer." D.C. Code § 7-2551.03(a), (b), (e). Significantly, however, these exceptions do *not* apply to injuries caused by a "machine gun," as expansively defined under the Act.

2. The plaintiffs in this case are the District of Columbia government and nine individuals who allege that they were injured, or represent the estates of individuals who were fatally injured, by criminals who unlawfully discharged firearms in the District. Pet. App. 4a. The defendants are manufacturers and distributors of firearms, and include Beretta U.S.A. Corp.; Browning Arms Co.; Century International Arms, Inc.; Colt's Manufacturing Co.; Fabbrica d'Armi Pietro Beretta S.p.A.; Forjas Taurus, S.A.; Glock Ges.m.b.H.; Glock, Inc.; Heckler & Koch, Inc.; Hi-Point Firearms; H&R 1871, Inc.; International Armament Corp. d/b/a Interarms

Industries, Inc.; K.B.I., Inc.; Navegar, Inc. d/b/a Intratec; Norinco Sports U.S.A., Inc.; Phoenix Arms; Sigarms, Inc.; Smith & Wesson Corp.; Sturm Ruger & Co.; and Taurus International Manufacturing, Inc. *Id.*

With very limited exceptions, none of the defendants manufactures, sells or distributes firearms within the District of Columbia.[1] Indeed, the District is generally acknowledged to have the most restrictive gun control laws in America, and has long prohibited the manufacture, sale or possession within the District of the firearms at issue in this case. *See* D.C. Code § 7-2504.01 (prohibition on manufacture), §§ 7-2502.01 & -2502.02 (prohibition on possession).

Respondents sued petitioners in D.C. Superior Court, bringing claims under the Act, as well as common-law claims for nuisance and negligence. Pet. App. 5a-6a. Respondents sought an award of money damages, as well as permanent injunctive relief and "abatement" of petitioners' conduct in connection with the lawful manufacture and sale of their products outside the District. *Id.* at 5a-6a, 107a. Although the individual respondents alleged that they (or someone they represented) had been injured by a firearm within the District of Columbia, they admitted that they could not link any petitioner to any of the firearms that caused the injuries. *Id.* at 161a (respondents "fail to identify which defendant and corresponding product was involved in their respective injury"), 47a (opinion of Wagner, C.J.) ("Even at the en banc argument, counsel for [respondents] had to concede that they still cannot tie any of the individual defendants to a weapon that caused harm to any one of them.").

The trial court granted judgment on the pleadings in favor of petitioners, holding the Act unconstitutional under the Commerce and Due Process Clauses of the United States Constitution. *Id.* at 171a-182a. Relying on this Court's deci-

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[1] Firearms manufacturers can and do sell firearms to military and law enforcement agencies working in the District, such as the District's Metropolitan Police Department.

sions in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy v. The Beer Institute*, 491 U.S. 324 (1989), the court agreed that the Act violates the Commerce Clause because it does and was meant to restrict commercial behavior beyond the borders of the District of Columbia. Pet. App. 172a-175a. Because the Act "confers strict liability for all damages that flow from the discharge of [firearms] inside the District, without regard to any allegation or proof of 'fault,'" there is "no way of avoiding liability under the Act without going out of business altogether or at least implementing a substantial overhaul of the entire set of relationships with suppliers, distributors, etc." *Id.* at 174a. "Such drastic changes in the structure of the firearms business (even as to only certain classes of weapons) are either not mandated at all by other jurisdictions (or by the federal government) or are not mandated consistently outside the District." *Id.*

Condemning "[t]he instant lawsuit [as] a direct attempt to use the Act as a tool of policy enforcement through the collection of money damages," the court held the Act unconstitutional *per se* under the Commerce Clause as a direct regulation of lawful, out-of-state business activity. *Id.* at 175a. The court held, in the alternative, that "the Act does not even pass muster" under the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because "it is obvious that the use of the Act as a basis for litigation cannot possibly have only an 'incidental' impact on interstate commerce." Pet. App. 177a.

The court also held that the Act violated the Due Process Clause. While recognizing that "public safety is a valid state concern," the court emphasized that the Constitution does not permit "extraterritorial exercise of such police powers specifically to pursue that particular local interest." *Id.* at 178a-179a (citing *BMW v. Gore*, 517 U.S. 559 (1996)). Thus, "the invocation of a law aimed at public safety is not, in and of itself, an exception to the requirements of the Due Process Clause." *Id.* at 181a.

The court also rejected respondents' common-law theories, holding that they had failed to plead facts sufficient to state a claim. *Id.* at 115-52.[2]

3. The District of Columbia Court of Appeals, sitting en banc, reversed the dismissal of the claims under the Act. Pet. App. 29a-46a.[3] Although the court conceded that the Act "may have *effects* outside the District if manufacturers alter their business practices to avoid . . . liability" under the Act, it held that the Act "does not directly regulate interstate commerce." *Id.* at 40a (punctuation altered). The court stated that "in contrast to the[ ] statutes [at issue in *Brown-Forman* and *Healy*], the Strict Liability Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect." Pet. App. 41a (quotation omitted). "That the risk [the Act] creates of damage awards in the District may conceivably affect the defendants' pricing or insurance decisions related to a limited class of the products they manufacture is not the 'direct control of commerce' that the Commerce Clause forbids without more." *Id.* at 41a (brackets and citation omitted).

The court then reviewed the Act under the *Pike* balancing test and deemed it constitutional because it "addresses a pressing concern for public safety" while having only "incidental" effects on interstate commerce that were "not clearly

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[2] The court noted that because respondents "have failed to sufficiently plead the factual basis for [their claims under the Act], there is technically no need for the Court to decide whether the Strict Liability Act is unconstitutional," but rendered an alternative holding that even if the facts were sufficiently pled, "this Court would be compelled to grant the instant motion on constitutional grounds." Pet. App. 171a. As discussed below, the Court of Appeals reached both questions, and rejected both of the trial court's holdings, thus preserving the constitutional issue for this Court's review.

[3] A three-judge panel originally decided the case. Pet. App. 51a. The court then granted rehearing en banc and issued an opinion that superseded the panel opinion, but applied the same reasoning and reached the same conclusions. Pet. App. 1a.

excessive in relation to the local benefits." Pet. App. 42a (brackets and ellipsis omitted). Dismissing as "fanciful" the trial court's finding that the liability imposed by the Act would cause petitioners to alter their national business practices, the court concluded that such liability "does not implicate the Commerce Clause." *Id.* at 43a-44a (quotation omitted).

The court similarly rejected petitioners' due process challenge, holding that "no due process issue is raised by legislation that seeks to redress injuries suffered by District residents and visitors resulting from the manufacture and distribution of a particular class of firearms whose lethal nature far outweighs their utility." Pet. App. 46a. It distinguished *BMW v. Gore* and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), on the basis that the territorial limitations recognized in those cases were limited to *punitive* damage awards, and did not restrict a State's power "to permit compensation to victims for injuries suffered within its jurisdiction." Pet. App. 45a-46a.

Finally, the court affirmed the dismissal of respondents' common law claims, remanding the case for trial solely on the statutory claims under the Act. Pet. App. 3a.[4]

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions of constitutional law that are not limited to the firearms context, but apply to all product manufacturers engaged in interstate commerce. By subjecting companies to multimillion-dollar penalties for doing nothing more than lawfully manufacturing and selling their nondefective products elsewhere in the country, the District of Columbia has violated the territorial limits on its jurisdiction enshrined in the United States Constitution.

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[4] The District of Columbia remains in the case, as it has asserted a subrogated claim for recovery of medical expenses under two District statutes that is derivative of and depends entirely on an individual's right to recover under the Act. Pet. App. 3a, 35a n.12.

Unlike traditional product liability statutes, which require proof of defect or some showing of fault on the part of the manufacturer, the Act imposes absolute and automatic liability on petitioners. Further distinguishing this case from a traditional product liability case is the fact that, unlike the manufacturer of a typical product that is mass-marketed and sold throughout the country, petitioners are barred under District of Columbia law from manufacturing or selling their products within the District. Indeed, under the District's gun control laws, individuals are generally prohibited from possessing firearms. Thus, petitioners are not in any sense attempting to do business in the District or to focus their marketing efforts on District residents.

In almost all cases, petitioners will be required to pay for injuries that are the direct result of two intervening criminal acts by a third party or parties, who (1) bring the firearm into the District illegally and (2) use the firearm to injure someone. Thus, if a firearm lawfully made by petitioner Beretta were lawfully sold in the State of Connecticut, Beretta would be held absolutely liable under District of Columbia law if the firearm were stolen from its lawful owner's house in Connecticut, illegally smuggled into the District, and used to shoot someone in the course of a crime.

The purpose and the unavoidable consequence of the Act is to discourage petitioners from manufacturing certain firearms. Indeed, because petitioners are forbidden from doing business in the District, and because they cannot prevent criminals from bringing their products into the District and using them to commit crimes, the only way petitioners can avoid liability under the Act is to abandon the manufacture and sale of covered firearms in all States *outside* the District. The Court of Appeals erred, and defied the constitutional limitations on extraterritorial regulation, by endorsing the District of Columbia's effort to project its policy choice nationwide.[5]

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[5] The District of Columbia is subject to the limits of the dormant Commerce Clause, *see Milton S. Kronheim & Co. v. District of Colum-*

This Court's review is warranted for two main reasons. First, the ruling below directly conflicts with this Court's decisions holding that the Commerce and Due Process Clauses, as well as basic principles of federalism inherent in the constitutional structure, prevent a single State from using its tort law to regulate commerce in other States and to effectuate its preferred policies on a national level. Second, the decision below directly conflicts with decisions of federal courts of appeals that have struck down, as *per se* invalid, a wide variety of statutes that have the practical effect of controlling out-of-state commercial conduct, *regardless* of whether the statutes explicitly mention price. The lower courts are divided and confused as to the types of laws that constitute "direct regulation" of out-of-state commerce subject to the *per se* ban, and guidance from this Court is necessary.

I. THE RULING BELOW CONFLICTS WITH DECISIONS OF THIS COURT BARRING A STATE FROM REGULATING COMMERCE IN OTHER STATES.

A. This Court Has Recognized And Enforced These Territorial Limitations In A Variety Of Contexts.

The Constitution of the United States enshrines the bedrock principle that "[n]o State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). A State's laws are "presumptively territorial and confined to limits over which the law-making power has jurisdiction." *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918). Consequently, this Court has repeatedly invoked the Commerce Clause and Due Process Clause to

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[Footnote continued from previous page]

bia, 91 F.3d 193, 198 (D.C. Cir. 1996) ("we apply to local legislation of the District the same interstate commerce analysis as we would to state laws"), and the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

"'preclude[ ] the application of [state law] to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" *Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982)).

These territorial limitations have long been recognized as implicit in the constitutional structure. In *Huntington v. Attrill*, 146 U.S. 657, 669 (1892), the Court held that "[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States." And in *New York Life Insurance Co. v. Head*, 234 U.S. 149, 161 (1914), the Court stated that "it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." The fact that extraterritorial regulation may be achieved through civil damage awards as opposed to an injunction does not remove the constitutional taint, as "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Trade Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

As discussed below, the Court has enforced these principles with regard to pricing and takeover statutes invalidated under the Commerce Clause because they regulated out-of-state business activity, and punitive damage awards declared unconstitutional under the Due Process Clause because they were based on lawful, out-of-state conduct. The ruling below directly conflicts with these decisions and, if permitted to stand, will invite States to project their preferred policy choices nationwide, at the expense of lawful interstate commerce and the policy decisions of sister States.

1. The Commerce Clause Bars "Direct Regulation" Of Out-Of-State Commerce.

The Commerce Clause acts as "a limitation upon the power of the States," *Freeman v. Hewit*, 329 U.S. 249, 252 (1946), and prohibits States from regulating conduct occurring in other States. In *Healy*, the Court struck down a Connecticut price affirmation statute that required beer distributors to affirm that their Connecticut prices did not exceed the prices they were charging in neighboring States. 491 U.S. at 326. The Court held that "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* at 336. Although the statute appeared to be aimed solely at in-state conduct, this was immaterial, as "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.*

This Court's decision rested not just on the Commerce Clause, but also on basic principles of federalism and state sovereignty. The Court emphasized "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." 491 U.S. at 335-36 (footnotes omitted). The constitutional structure cannot tolerate "the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 337.

The *Healy* Court relied heavily on *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), where the Court invalidated New York's price affirmation statute requiring distillers to post their in-state prices for the coming month, and affirm that those prices were no higher than the prices they would charge in other States during that time. *Id.* at 575-76. Although the Court acknowledged that the statute served a legitimate state inter-

est, it nonetheless invalidated the statute as *per se* unconstitutional under the Commerce Clause. The Court explained that when a state statute "directly regulates" commerce in other States, the Court has "generally struck down the statute without further inquiry." *Id.* at 579. In this case, New York had exceeded its authority under the Commerce Clause by "project[ing] its legislation" into other States, impermissibly attempting to regulate lawful, out-of-state commerce. *Id.* at 582-83 (quotation marks omitted).

Notably, in both *Healy* and *Brown-Forman*, the Court did *not* review the statutes at issue under the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which requires weighing the local benefits of the statute against the burden on interstate commerce. Rather, once the Court determined that the statutes directly regulated out-of-state commerce, that was the end of the analysis, and the statutes were declared unconstitutional *per se*. *See Brown-Forman*, 476 U.S. at 579 (establishing two-tier analysis in which statutes that "directly regulate" interstate commerce are deemed unconstitutional *per se*, while statutes that have only "indirect effects" on interstate commerce are reviewed under the *Pike* balancing test).

The Commerce Clause principles recognized in *Healy* and *Brown-Forman* are not confined to the context of price affirmation statutes, but apply to all state statutes that purport to regulate commerce occurring in other States. In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), for example, the Court struck down an Illinois takeover statute that granted Illinois the authority to regulate interstate tender offers, as long as the target company had certain in-state connections. The plurality concluded that the Illinois law "directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois." *Id.* at 641. Thus, although the Commerce Clause permits "*incidental* regulation of interstate commerce by the States[,] direct regulation is prohibited" as unconstitutional *per se*, regardless of any local benefits. *Id.* at 640.

2. The Due Process Clause Also Prohibits Extraterritorial Regulation.

The Due Process Clause places similar restrictions on a State's ability to regulate out-of-state commerce through civil damage awards. Just as a State cannot directly prohibit the manufacture or sale of goods in another State, it cannot achieve the same result indirectly, by threatening manufacturers with massive monetary punishments if they do not withdraw their products from the market.

In *BMW v. Gore*, 517 U.S. 559 (1996), the Court rejected an Alabama court's attempt to impose punitive damages based on the defendant's business activities in other States. The Court explained that "each State has ample power to protect its own consumers, [and] none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." *Id.* at 585. "[O]ne State's power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce, . . . but is also constrained by the need to respect the interests of other States." *Id.* at 571-72 (citing *Healy*, 491 U.S. at 335-36, and *Edgar*, 457 U.S. at 643). Consequently, "principles of state sovereignty and comity" dictate "that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," because such damage awards would unconstitutionally interfere with those States' interests and policy choices. *Id.* at 572.

The Court tightened these constitutional restrictions in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), where it held that a State cannot use its tort law—in that case, its punitive damages law—as a means "to rebuke [a defendant] for its nationwide activities," emphasizing that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." *Id.* at 420-21. "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State

alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Id.* at 422 (citing *Gore*, 517 U.S. at 569).[6]

B. The Decision Below Authorizes The District Of Columbia To Regulate Out-Of-State Commerce And To Project Its Policy Choice Nationwide.

The decision below runs roughshod over basic principles of federalism and directly conflicts with the many decisions of this Court recognizing and enforcing the constitutional limits on state attempts to regulate extraterritorial commerce. By upholding the District of Columbia's effort to reduce the number of firearms nationwide through its "liability without fault" statute, the Court of Appeals approved a statute that plainly violates the Commerce and Due Process Clauses, and encroaches on the autonomy of the States to determine their own policies, as well as the right of petitioners to manufacture and sell their lawful, nondefective products in other jurisdictions.

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[6] These territorial restrictions have also been applied in the context of state tax laws and personal jurisdiction. In *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 303 (1994), for example, this Court stated that "[t]he Due Process and Commerce Clauses of the Constitution . . . prevent States . . . from tax[ing] value earned outside [the taxing State's] borders" (internal quotations omitted). And in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the Court held that a state tax must concern "an activity with a substantial nexus with the taxing State" to survive constitutional challenge. *Id.* at 279. Similarly, this Court has long recognized that a State cannot exercise jurisdiction over a defendant absent sufficient contacts between the defendant and the State. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102 (1987). As the *Edgar* plurality explained, "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'" 457 U.S. at 643 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).

1. The Act directly regulates out-of-state commerce by forcing manufacturers to abandon the manufacture and sale of firearms in other States or to face substantial, multimillion-dollar liability "without regard to fault or defect" in the District of Columbia. The Act falls squarely within the Commerce Clause's *per se* prohibition on state laws that apply "to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy*, 491 U.S. at 336 (quoting *Edgar*, 457 U.S. at 642-43). Indeed, the conduct regulated by the Act is *by definition* out-of-state commercial conduct. With very limited exceptions, petitioners cannot and do not sell their products in the District of Columbia, and as a result, there is no "in-state" commercial conduct that the Act could be intended to target. Petitioners cannot avoid liability by withdrawing from the District of Columbia market or otherwise changing any of their in-state business practices.

The Act also violates the Due Process Clause's prohibition on extraterritorial enforcement of state statutes. Indeed, the Act is a classic example of a State "impos[ing] economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," *Gore*, 517 U.S. at 572, as it is the District of Columbia's intent to use the statute as a way of forcing petitioners to modify their lawful commercial activity in other States. Although the Court of Appeals sought to distinguish *Gore* and *State Farm* on the basis that those cases involved *punitive* damage awards, Pet. App. 45a-46a, *Gore* speaks more broadly of "economic sanctions," and the territorial limits recognized in both cases are not restricted to the punitive damages context—as evidenced by the fact that both cases cited and relied upon precedent involving extraterritorial regulation generally. *See Gore*, 517 U.S. at 571-72; *State Farm*, 538 U.S. at 421-22. In short, both the purpose and effect of the Act is to deter and punish lawful commerce in firearms in other States, and the Court of Appeals misapplied *Gore* and *State Farm* in concluding otherwise.

2. The fact that the Act may also be intended to remedy injuries occurring within the District does not make it constitutional. "The critical inquiry is whether *the practical effect* of the regulation is to control conduct beyond the boundaries of the State," *Healy*, 491 U.S. at 336 (emphasis added), and the obvious practical effect of the Act's draconian liability regime is to pressure petitioners to change their out-of-state conduct by halting the manufacture and sale of their products altogether. *Cf. Brown-Forman*, 476 U.S. at 580 ("The mere fact that the effects of New York's [statute] are triggered only by sales of liquor within the State of New York . . . does not validate the law if it regulates . . . out-of-state transactions"). Particularly in light of the ruling below—which authorizes respondents to proceed with their lawsuit even though they candidly admit that they cannot at this time link any particular manufacturer's firearm to the injuries at issue—petitioners risk being haled into court and forced into discovery every time a person is injured with a firearm in the District of Columbia. Thus, even in cases where, as here, the plaintiff does not even allege a link between an injury and a particular manufacturer, the entire *industry* can be sued, compelled to submit to the discovery process, and forced to incur substantial litigation costs.

Although the words "strict liability" appear in its title, the Act is nothing of the sort. Rather, the Act imposes *absolute* and *automatic* liability on petitioners "without regard to fault or proof of defect," thus distinguishing it from traditional product liability statutes that require proof of design or manufacturing defect, or a showing of other fault on the part of the manufacturer or seller. Petitioners cannot avoid liability by designing their products differently, as the Act imposes liability based on the products' very nature, rather than on a design or manufacturing defect. The Act also dispenses with traditional notions of causation by imposing liability on petitioners even where the injury resulted from the intervening criminal acts of a third party. In short, petitioners are being punished for doing nothing more than manufacturing and selling a lawful, nondefective product—conduct that is non-

tortious in other jurisdictions, and is expressly sanctioned under federal law. *See* 18 U.S.C. § 923 (permitting federally licensed manufacturers to make and sell firearms).[7]

The consequence is that the Act, in "practical effect," *Healy*, 491 U.S. at 336, controls out-of-state commercial conduct in a way that a traditional strict products liability statute does not. Because petitioners have virtually no defenses to liability, the only way they can avoid being forced to pay regular multimillion-dollar judgments in the District as a result of the criminal conduct of third parties is to halt the manufacture of the covered products altogether. Indeed, supporters of the statute have touted the Act as "possibly lead[ing] to the voluntary withdrawal [of the affected firearms] from the market." Markus Boser, *Go Ahead, State, Make Them Pay: An Analysis of Washington D.C.'s Assault Weapon Strict Liability Act*, 25 COLUM. J.L. & SOC. PROBS. 313, 336 (1992).[8]

The Court of Appeals' assertion that the Act "may conceivably affect the defendants' pricing or insurance decisions related to a limited class of the products they manufacture," Pet. App. 41a, trivializes and grossly understates the breadth and effect of the Act. The sweeping definition of "machine gun," D.C. Code § 7-2501(10), coupled with the fact that "machine guns" do not qualify for the specific exceptions to liability, means that petitioners will be made to pay damages

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[7] Although the Court of Appeals seemingly likened the Act to state laws imposing liability on those who engage in an "abnormally dangerous" activity, Pet. App. 42a-43a, those laws traditionally relate not to products, but to activities, such as blasting, that are land-based and are dangerous in and of themselves. The doctrine has no application to non-defective products that are misused by criminals to cause harm. *See, e.g., Delahanty v. Hinckley*, 564 A.2d 758, 761 (D.C. 1989) (rejecting application of this doctrine to firearm manufacture and sale).

[8] Even withdrawing their products from the market entirely would not insulate petitioners from liability with regard to the many firearms that have already been sold and are in circulation, and which could be brought illegally into the District from other jurisdictions.

for injuries resulting from a wide array of semi-automatic firearms, even in cases where the initial sale was to the military or law enforcement. The combination of these provisions results in enormous coercive force on petitioners to stop manufacturing and selling the covered firearms or to face potentially bankrupting penalties. The Court of Appeals' speculation that petitioners could spread the cost through insurance or by adjusting their prices, Pet. App. 41a, is utterly unsupported by the record or reality.

3. Firearms, like automobiles and many other products commonly used throughout the United States, are inevitably and unavoidably involved in situations that result in injury. The District of Columbia is free to impose liability against manufacturers, and to assess awards of money damages, in cases where injuries result because the product is defective or the manufacturer is otherwise at fault. But to impose liability *without regard* to fault or defect is a policy choice that carries with it the potential for such severe and overwhelming monetary sanctions that its practical effect is to strongly influence the manufacturer's decision to make and sell the product in the first place. If, for example, a State were to conclude that because some people drive sport utility vehicles (SUVs) in excess of the speed limit, it would force automobile manufacturers, without regard to their fault or the absence of a defect in a particular SUV, to pay the medical costs of people injured in all collisions involving SUVs—even in cases where the driver intentionally or recklessly violated traffic laws and caused the collision—such a law would act as a strong deterrent to any manufacturer considering selling SUVs in America. There is no question that a state legislature can enact a statute that affords compensation to its citizens for products found to be defective, but a State cannot enact a liability regime so draconian, and so divorced from traditional notions of fault and culpability, that it forces the manufacturer to withdraw the product from all 50 States.

In sum, the clear purpose and effect of the Act is to "impose [the District of Columbia's] own policy choice on neighboring States," *Gore*, 517 U.S. at 570-71, and the na-

tion as a whole. If allowed to stand, the decision below will encourage similar regulation of products that a single State determines must be eradicated from the country—even where, as here, other States have deemed the manufacture, sale and possession of the product to be perfectly lawful.

II. THE LOWER COURTS ARE DIVIDED AND CONFUSED AS TO WHAT CONSTITUTES "DIRECT REGULATION" OF OUT-OF-STATE COMMERCE.

This Court has established a two-tiered analysis for resolving dormant Commerce Clause challenges to state regulations:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142.

Brown-Forman, 476 U.S. at 579; *Healy*, 491 U.S. at 337 n.14 (quoting language above and stating that "[a]s a general matter, the Court has adopted a two-tiered approach to analyzing state economic regulation under the Commerce Clause"); *Granholm v. Heald*, 125 S. Ct. 1885, 1904 (2005) (quoting *Brown-Forman* holding that state statute that "directly regulates" out-of-state commerce is unconstitutional *per se*).

The lower courts are conflicted and confused as to when a state statute "directly regulates" out-of-state commerce and must be invalidated as unconstitutional *per se* rather than subjected to the *Pike* balancing test. Some courts, including the Court of Appeals below and the Fourth Circuit, have confined *Healy* and *Brown-Forman* to their facts by limiting the

per se ban to statutes that regulate the price of out-of-state transactions. Other courts, including the Second, Seventh, Ninth and Tenth Circuits, have construed "direct regulation" far more broadly and struck down state statutes that have nothing to do with the price of goods, but are nonetheless found to directly regulate out-of-state commerce. Still other courts, including the First and Eighth Circuits, have essentially declared that the "direct regulation" test has no independent force and is subsumed entirely within the prohibition on "discrimination" against interstate commerce.

Courts and commentators have noted the confusion on this issue, concluding that the law in this area is "unsettled" and "[t]he scope of the extraterritoriality principle is unclear." Jack L. Goldsmith and Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 789 (2001); *see also* Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 503 (2003) ("Because the courts have been unable to decipher the broad, yet cryptic language set forth in the line of cases extending from *MITE* to *Healy*, they have developed a patchwork approach to dealing with the problem of restraining extraterritorial state legislation."); Donald Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1885 (1987) (surveying case law and concluding that "we hardly know how to begin thinking about what the principle entails in any but the easiest cases"). Even one of the lawyers who has been on the opposite side of the instant lawsuits has publicly acknowledged that "the lower courts' efforts to follow the Supreme Court's lead have resulted in confusion and inefficiency." Allen Rostron, *The Supreme Court, The Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 MICH. ST. U. L. REV. 115, 119.

The question is substantial and recurring, as courts are increasingly analyzing the application of state laws to com-

mercial activity, such as Internet businesses, that operate on a national basis. The unsettled state of the law in this area makes it difficult to know in advance when a state statute amounts to "direct regulation" of out-of-state commerce—and must instantly be struck down as unconstitutional *per se*—or when it has only "indirect effects" on interstate commerce and is reviewed under the more lenient *Pike* balancing test.

This Court should grant review and dispel the confusion by holding that the *per se* ban on direct regulation of out-of-state commerce applies to all types of statutes with extraterritorial reach.

1. In rejecting petitioners' constitutional challenge, the court below held, with virtually no analysis, that the Act did not "directly regulate" out-of-state commerce because, "in contrast to the[ ] statutes [at issue in *Brown-Forman* and *Healy*], the Strict Liability Act 'does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect.'" Pet. App. 41a (quoting *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003) (emphasis altered)).[9] "That the risk it creates of damage awards in the District may conceivably affect the defendants' pricing or insurance decisions . . . is not the 'direct control of commerce' that the Commerce Clause forbids

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[9] In *Walsh*, the Court distinguished the Maine statute at issue from the price affirmation statute in *Healy* on the basis that Maine was not trying to control the price of out-of-state transactions. *Id.* at 669-70. But the Court's brief discussion of this point did not attempt to limit the types of statutes subject to the *per se* ban to price affirmation statutes, and subsequent circuit court decisions have continued to apply *Healy* to strike down other types of statutes, thus demonstrating that the confusion and disagreement persist. *See, e.g., American Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003). *See also* Felmly, 55 ME. L. REV. at 499 (noting that the *Walsh* Court's "discussion of the drug manufacturer's dormant Commerce Clause challenge . . . unfortunately offered very little guidance to the circuit courts to assist them in their struggle to determine just when a state regulation has effects completely outside the borders of the enacting state").

without more." Pet. App. 41a (quoting *Healy*, 491 U.S. at 336) (brackets omitted).

Likewise, in *Star Scientific v. Beales*, 278 F.3d 339 (4th Cir. 2002), the Fourth Circuit rejected a Commerce Clause challenge to a Virginia statute requiring certain cigarette manufacturers to pay money into a healthcare escrow fund based on the number of cigarettes they sold within Virginia. The court held that "the rule of *per se* invalidity does not apply" because "[t]he statute does not insist on price parity with cigarettes sold outside of the State" and therefore "does not have the 'practical effect' of controlling prices or transactions occurring wholly outside the boundaries of Virginia, as was the case in *Brown-Forman* and *Healy*." 278 F.3d at 356.

2. Many courts take the opposite approach and have applied the rule of *per se* invalidity broadly, striking down a wide array of statutes that did not explicitly regulate price. In *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003), for example, the Second Circuit held that a Vermont law prohibiting Internet distribution of sexually explicit material to minors violated the Commerce Clause. Relying on *Healy* and *Brown-Forman*, the court held that "[b]ecause the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without 'projecting its legislation into other States.'" *Id.* at 103 (quoting *Healy*, 491 U.S. at 334). Thus, because "[i]n practical effect, Vermont 'has projected its legislation into other States, and *directly regulated* commerce therein,'" the statute "presents a *per se* violation of the dormant Commerce Clause" and there is "no need to apply the *Pike* balancing test." 342 F.3d at 104 (quoting *Brown-Forman*, 476 U.S. at 584) (emphasis added by Second Circuit).

Similarly, in *National Solid Wastes Management Association v. Meyer*, 63 F.3d 652, 653-55 (7th Cir. 1995), the Seventh Circuit struck down, as *per se* invalid, a Wisconsin statute barring waste generators (many of whom were from out of state) from dumping solid waste in Wisconsin landfills unless their home community adhered to Wisconsin's recy-

cling standards. The court specifically emphasized that *Healy* was *not* limited to statutes explicitly regulating price, but was "consistent with a long line of cases . . . [that] make clear that the Court will not hesitate to strike down a state law shown to have extraterritorial scope and an adverse impact on commerce occurring wholly outside the enacting state." *Id.* at 658-59 & n.8. Thus, "[a]lthough cases like *Healy* and *Brown-Forman* involved price affirmation statutes, *the principles set forth in these decisions are not limited to that context.*" *Id.* at 659 (emphasis added and citation omitted). The court noted that "[t]he breadth of the principle is demonstrated by its use by the plurality" in *Edgar v. MITE Corp.*, where it was applied to a state takeover statute. *Id.*

In *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), the Ninth Circuit held that a Nevada statute requiring national collegiate athletic associations to provide Nevada schools and athletes with certain due process protections in cases of suspected rules violations was *per se* unconstitutional under *Healy* and *Brown-Forman*. The court began by recognizing that if a state statute "directly regulates interstate commerce," it "violates the Commerce Clause *per se* and we must strike it down without further inquiry." *Id.* at 638. Determining that the statute "could control the regulation of . . . a product in interstate commerce that occurs wholly outside Nevada's borders," the court held that "[t]hat sort of extraterritorial reach is forbidden by the Commerce Clause." *Id.* at 639. The court thus struck down the statute as invalid *per se*, concluding that it "need not balance the burden on interstate commerce against the local benefit derived from the Statute." *Id.* at 640.

Finally, the Tenth Circuit, in *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), enjoined a New Mexico statute criminalizing the dissemination by computer of material harmful to minors. The court concluded that because the statute imposed liability for conduct occurring in other States, it "represents an attempt to regulate interstate conduct occur-

ring outside New Mexico's borders, and is accordingly a *per se* violation of the Commerce Clause." *Id.* at 1161.[10]

3. A third group of courts has all but declared the *Healy/Brown-Forman* "direct regulation" test a dead letter, and have subsumed it within the ban on "discrimination" against out-of-state commerce. For example, in *Grant's Dairy-Maine, LLC v. Commissioner of Maine Department of Agriculture*, 232 F.3d 8, 19 (1st Cir. 2000), the First Circuit described *Brown-Forman*'s prohibition on direct regulation as "dictum," and rejected a Commerce Clause challenge to a Maine statute regulating milk prices. The court asserted that *Brown-Forman*'s "reference to direct regulation as a basis for invalidation has not been repeated in subsequent Supreme Court opinions" and concluded that "it does not fit into the [current] framework" that requires "courts to look for discriminatory 'purposes and effects'" in resolving Commerce Clause challenges. *Id.* (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)).

Similarly, in *Southern Union Co. v. Missouri Public Service Commission*, 289 F.3d 503, 507 (8th Cir. 2002), a utility company argued that a Missouri statute was "per se invalid because it [was] both 'extraterritorial' and 'direct' regulation of interstate commerce." The Eighth Circuit rejected the argument, stating that "[i]n its recent Commerce Clause decisions, the Supreme Court has limited its per se rule of invalidity to provisions that patently discriminate against interstate trade." *Id.* at 508 (quotation omitted). The court concluded that "[h]ere, no discrimination against interstate commerce, or other form of 'economic protectionism,' is at work, as it was in the Commerce Clause cases upon which

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[10] The Third Circuit has also indicated that it follows this approach. *See A.S. Goldman & Co. v. New Jersey Bureau of Secs.*, 163 F.3d 780, 784-85 (3d Cir. 1999) (stating that a New Jersey law prohibiting the sale of certain securities falls within the "consistent strain [of cases] authoriz[ing] courts to invalidate state regulations when their extraterritorial impact is so great that their 'practical effect . . . is to control conduct beyond the boundaries of the state'") (quoting *Healy*, 491 U.S. at 336).

[the utility company] primarily relies." *Id.* (citing *Healy* and *Brown-Forman*). Thus, the Eighth Circuit, like the First Circuit, accords no independent force to the *per se* ban on "direct regulation" beyond that already contained in the prohibition on "discrimination."

4. The decision below adds to the confusion over an important and recurring question of constitutional law that warrants this Court's intervention. This Court should grant review and resolve the question in petitioners' favor, making clear that the *per se* ban on "direct regulation" of out-of-state commerce remains valid and is not narrowly limited to statutes that explicitly regulate price. As the Seventh Circuit recognized in *Meyer*, 63 F.3d at 653-55, the *Healy* and *Brown-Forman* decisions are simply recent articulations of the longstanding principle that a State cannot project its laws beyond its borders in an attempt to regulate commerce in other jurisdictions—and that such statutes must be struck down as unconstitutional *per se*. The contrary conclusion of the court below, which refused to apply these principles outside the narrow context of price affirmation statutes, should be reversed.

III. THIS COURT HAS JURISDICTION UNDER *COX BROADCASTING*.

This case falls squarely within a well-recognized exceptions to the finality requirement of 28 U.S.C. § 1257. In *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), this Court held that it could exercise jurisdiction over cases

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action[.]

Id. at 482-83. "In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at 483.

Here, the federal issue—the constitutionality of the Act—has been finally decided in the District of Columbia courts. Moreover, petitioners may well prevail on the merits on nonfederal grounds, given respondents' failure even to allege a link between their injuries and a firearm manufactured by a particular petitioner. Reversal of the D.C. Court of Appeals on the federal issue would be preclusive of further litigation on respondents' claims under the Act; indeed, it would terminate this entire lawsuit, as the court below affirmed the dismissal of respondents' common-law causes of action. Delaying review of the ruling below would frustrate and erode federal policy by potentially leaving in effect a decision allowing lawsuits to proceed under the Act despite the obvious harm to interstate commerce and petitioners' constitutional rights, as well as the interests and public policies of the many States that permit the manufacture, sale and possession of firearms.

In fact, this case is in virtually the same procedural posture as was *Cox Broadcasting* itself when the Court granted certiorari. In that case, as here, the highest state court upheld the constitutionality of a state statute, and remanded for trial on the merits. 420 U.S. at 475. As here, the state court's judgment was "final on the federal issue" and the defendants would have been "liable for damages if the elements of the state cause of action [were] proved," whereas if the Court granted review and held the statute unconstitutional, "this litigation ends." *Id.* at 485-86. And as here, "even if [the defendants] prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action . . . may go forward" despite "a statute the constitutionality of which is in serious doubt." *Id.* at 485-86. *See also Goodyear Atomic Corp. v. Miller*, 486 U.S.

174, 177-78 (1988) (immediate review of interlocutory ruling warranted under *Cox Broadcasting* where federal question was finally determined by state supreme court, and a reversal would preclude further proceedings); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (reviewing interlocutory ruling to avoid subjecting parties "to long and complex litigation which may all be for naught" if defendants ultimately prevailed on federal issue). Accordingly, this Court should grant review.

CONCLUSION

The District of Columbia's statute threatens petitioners and other firearms manufacturers with draconian penalties based on their lawful out-of-state commercial activity—and on the criminal misconduct of third parties over whom the manufacturers have no control. The purpose and consequence of the Act is to deter manufacturers from making and selling their lawful, nondefective products in other States. The lower courts are divided and confused over the proper application of the *per se* rule of invalidity in cases where a state statute directly regulates out-of-state commerce. For these reasons, this Court should grant review and make abundantly clear that the District of Columbia's attempt to project its policy choice nationwide is impermissible under the Commerce Clause, the Due Process Clause and basic principles of federalism.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA, Appellant, v. BERETTA, U.S.A., CORP., et al., Appellees.	No. 03-CV-24, 03-CV-38
BRYANT LAWSON, et al., Appellants, v. BERETTA, U.S.A., CORP., et al., Appellees.	

Argued En Banc Jan. 11, 2005.

Decided April 21, 2005.

James C. McKay, Jr., Senior Assistant Attorney General for the District of Columbia, with whom Robert J. Spagnoletti, Attorney General for the District of Columbia, and

Edward E. Schwab, Deputy Attorney General for the District of Columbia, were on the brief, for appellant in No. 03-CV-24.

Eric J. Mogilnicki, Washington, with whom A. Stephen Hut, Jr., John Payton, David S. Molot, R. Kevin Bailey, Karen C. Daly, Rachel Zakar Stutz, Michael A. Mugmon, Roderick V.O. Boggs, and Susan E. Huhta were on the brief, for appellants in No. 03-CV-38.

Lawrence S. Greenwald and Michael L. Rice, with whom Thomas E. Fennell, James A. Wilderotter, Paul R. Reichert, Lawrence P. Fletcher-Hill, Catherine A. Bledsoe, Robert E. Scott, Jr., Guido Porcarelli, William M. Griffin, III, Jonann E. Coniglio, Paul F. Strain, M. King Hill, III, James P. Dorr, Sarah L. Olson, John F. Renzulli, Jeffrey M. Malsch, Scott C. Allen, Charles L. Coleman, III, Warwick R. Furr, II, Michael C. Hewitt, Michael J. Zomcik, Robert C. Tarics, Michael Branisa, Gerald F. Ivey, Amanda L. Rixse, Lauren Lacey, Timothy A. Burnann, Paul Schleifman, Jeffrey S. Nelson, and Tina Schaefer were on the brief, for appellees.

Brian J. Siebel, Washington, with whom Dennis A. Henigan was on the brief, as amicus curiae on behalf of the Brady Campaign to Prevent Gun Violence.

Roy T. Englert, Jr., Alan E. Untereiner, Jan S. Amundson, and Quentin Riegel filed a brief as amicus curiae, Washington, on behalf of the National Association of Manufacturers.

James M. Beck, Kansas City, MO, Frank J. Eisenhart, J. Gregory Dyer, Washington, D.C., and Hugh F. Young, Jr., filed a brief as amicus curiae on behalf of the Product Liability Advisory Council, Inc.

Before WAGNER, Chief Judge, TERRY, FARRELL, REID, GLICKMAN, and WASHINGTON, Associate Judges, and PRYOR, Senior Judge.

Opinion for the court by Associate Judge FARRELL.

FARRELL, Associate Judge:

The District of Columbia and nine individual plaintiffs appeal from the dismissal of their suit against manufacturers or distributors of firearms alleging common-law negligence and public nuisance, as well as strict liability under D.C. Code § 7-2551.02 (2001). The trial court entered judgment on the pleadings for the defendants on all counts, ruling in substance that the counts of negligence and public nuisance failed basic tests of duty, foreseeability, and remoteness as pleaded; that the District of Columbia could not bring an action under § 7-2551.02; and that, as to the individual plaintiffs, the statutory tort was insufficiently pleaded and, in any event, is an unconstitutional exercise of extra-territorial regulation by the Council of the District of Columbia.

We reverse the dismissal of the statutory count as to the individual plaintiffs, holding that they may advance to discovery on strict liability notwithstanding the difficulties of proof they may confront. We also reverse the dismissal of that count as to the District of Columbia to the extent--but only the extent--that it seeks subrogated damages as to named individual plaintiffs for whom it has incurred medical expenses. Otherwise we sustain the judgment of the trial court, holding that none of the plaintiffs has stated a valid claim of common-law negligence and that the District has not stated a claim of public nuisance on the facts alleged.[1]

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[1] The present opinion by the court en banc supersedes the opinion issued by a division of the court, published at 847 A.2d 1127 (D.C. 2004).

I. Background

This is the second time in the District of Columbia that an actionable link has been attempted to be drawn between the manufacture or distribution of firearms and the criminal use of those weapons to kill or injure. *See Delahanty v. Hinckley,* 564 A.2d 758 (D.C. 1989) (on certified question from federal court, finding no common law basis on facts alleged for holding handgun manufacturers and their officers liable under D.C. law for criminal use of gun by John W. Hinckley, Jr.). The plaintiffs in the present case are the District of Columbia government and nine individual persons who themselves were wounded or represent decedents shot and killed by persons unlawfully using firearms in the District of Columbia.[2] The defendants are numerous manufacturers, importers, or distributors of firearms. Underlying all three counts of the complaint are allegations that may be summarized as follows: Although the District of Columbia itself has stringent gun control laws, there nonetheless exists an unchecked illegal flow of firearms into the District to which the defendants by action and inaction have contributed. This flow of guns takes place in numerous ways, including "straw purchases" (purchases from licensed dealers on behalf of other persons not qualified to buy under applicable law), multiple sales (multiple purchases over a short stretch of time by persons intending to sell or transfer to others not qualified to buy), sales by the defendants to "kitchen table" dealers licensed to sell but who do not do so from re-

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[2] To illustrate, the complaint alleges that plaintiff Bryant Lawson was shot by a semi-automatic firearm in early 1997 as he tried to flee from three armed men, all of whom were subsequently convicted of aggravated assault or related crimes arising from the shooting. As a result of the shooting, Lawson is a quadriplegic and suffers other ill effects of his disabling injuries.

tail stores, and gun show sales by sellers who typically lack federal firearm licenses and are not required to do purchaser background checks.

The complaint alleges that the defendants have distributed their firearms without adequate self-regulation or supervision in order to increase firearm sales, knowing or constructively knowing they are creating, maintaining, or supplying the unlawful flow of firearms into the District and similarly knowing those guns will be used to commit crimes such as the ones that have caused death or injury to the individual plaintiffs or persons they represent. The complaint further alleges numerous illustrative means by which the defendants are able to restrict or impede the unlawful flow of firearms into the District but have not done so. These include (to name just three) directing and encouraging their distributors and dealers to refuse to sell in circumstances where the dealer knows or should know that the buyer seeks to make a straw purchase; requiring such dealers to refuse to sell more than one handgun a month to any person not holding a federal firearms license; and requiring their distributors to sell only to "stocking dealers," *i.e.*, retailers who stock guns from retail stores, and not to "kitchen table" dealers or at gun shows.

Based on these general allegations, Count I of the complaint (Strict Liability) alleged that the defendants are liable to the District of Columbia under D.C. Code § 7-2551.02 and related statutes for health care costs, Medicaid expenses, and other costs of assistance and compensation paid by the District to or on behalf of victims of gun violence including civilians, police officers, and firefighters, and are liable to the individual plaintiffs for direct and consequential damages proximately caused by the defendants' conduct. Count II (Negligent Distribution) alleged that the defendants breached "a duty to the District and its residents not to create an unreasonable risk of foreseeable harm from the distribution of their

firearms, and to take reasonable steps to limit this risk once it had been created." In Count III (Public Nuisance) the District alone alleged that the defendants have "created an ongoing public nuisance of readily available handguns and machine guns that unreasonably interferes with District residents' enjoyment of health, safety, and peace."

II. Standard of Review

The defendants moved for judgment on the pleadings as to all counts, Super. Ct. Civ. R. 12(c), and the trial court granted the motion and dismissed each count for failure to state a claim for which relief can be granted. Rule 12(b)(6); *see Osei-Kuffnor v. Argana,* 618 A.2d 712, 713 (D.C. 1993) (standards same for dismissal under Rule 12(b)(6) and judgment under Rule 12(c)). In reviewing that decision, this court "conducts a *de novo* review of the record, construing all facts and inferences in the light most favorable to the plaintiff[s] and taking the complaint's allegations as true." *Duncan v. Children's Nat'l Med. Ctr.,* 702 A.2d 207, 210 (D.C. 1997). A complaint may not be dismissed because the court merely "doubts that [the] plaintiff[s] will prevail on a claim," *id.* (citation omitted), but "dismissal for failure to state a claim may properly be granted where it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [the] claim which would entitle [them] to relief." *Id.* (citation and quotation marks omitted).

Applying these standards, we consider first the two common-law counts alleged, then the statutory count as it relates to each of the two classes of plaintiffs.

III. Negligent Distribution

The trial court dismissed the count of negligent distribution primarily on the basis of *Delahanty, supra.* That decision, unless overruled, indeed appears to bar the plaintiffs' attempt to plead negligence for harm resulting from the unlawful actions of third parties. *Delahanty* came before a

division of the court as a certified question from the United States Court of Appeals asking "whether, in the District of Columbia, 'manufacturers and distributors of Saturday Night Specials may be strictly liable for injuries arising from these guns' criminal use.'" *Delahanty,* 564 A.2d at 759 (citation omitted). The panel's answer to that question ranged more widely, however. It pointed out that, although "[t]he certifying court focused on whether this court would adopt the strict liability theory described in *Kelley* [*v. R.G. Indus.*, 304 Md. 124, 497 A.2d 1143 (Md. 1985)]," that court noted that "'the theoretical underpinnings [of *Kelley*] are somewhat unclear' and that the certified question was not intended to restrict this court to a particular rationale for this cause of action." *Delahanty,* 564 A.2d at 760 (citation omitted). Further, because this court is "not limited to the designated question of law [in any event] but may 'exercise our prerogative to frame the basic issues as we see fit for an informed decision,'" and because the *Delahanty* appellants were not relying "exclusively on the *Kelley* theory but have continued to advance in this court all the theories in their complaint," we "expand[ed] our inquiry to include the question whether established theories of tort law in the District of Columbia provide a cause of action against gun manufacturers and distributors for injuries arising from the guns' criminal uses." *Id.* (citation omitted).

Just as the federal District Court had dismissed the entire complaint for failure to state a claim, this court "reject[ed] each of the theories appellants have advanced in the federal courts and in this court." *Id.* We rejected first their theory of strict liability for sale of a defective product, based not on a claim of defective design or manufacture--no such claim was advanced--but on the assertion "that the manufacturers had a duty to warn of the dangers of criminal misuse of the gun." There is no duty to warn, we answered, when a potential danger is known and recognized, and "[b]ecause hazards of firearms are obvious, the manufacturer had no duty to warn." *Id.* (citing *inter alia* RESTATEMENT (SECOND) OF

TORTS § 402A cmt. j). We paused only slightly longer over the appellants' attempt to apply the theory of "abnormally dangerous activity," *see* RESTATEMENT §§ 519, 520, to the marketing of handguns. That cause of action, we explained,

> applies only to activities that are dangerous in themselves and to injuries that result directly from the dangerous activity. The marketing of a handgun is not dangerous in and of itself, and when injury occurs, it is not the direct result of the sale itself, but rather ... of actions taken by a third party.

Delahanty, 564 A.2d at 761 (citation and quotation marks omitted). We again emphasized that "any likelihood that ... harm will be great ... would result from the use, not the marketing as such, of handguns." *Id.* And we rejected for similar reasons the "social utility" theory of tort adopted by the Maryland courts in *Kelley, supra*--"requiring proof that the danger of the product outweighs its social utility and that no legislative imprimatur be associated with the product to the contrary," *id.*--pointing out, among other things, that the appellants' attempt to make actionable the manufacture or distribution of "a certain class of inexpensive and allegedly unreliable handguns" (*i.e.,* Saturday Night Specials) ignored the fact that "[a]ll firearms are capable of being used for criminal activity." *Id.* at 761-62 (citation and internal quotation marks omitted).

Finally, we rejected the cause of action for negligent manufacture or distribution, explaining:

> "In general no liability exists in tort for harm resulting from the criminal acts of third parties, although liability for such harm sometimes may be imposed on the basis of some special relationship between the parties." *Hall v. Ford Enters., Ltd.,* 445 A.2d 610, 611 (D.C.

> 1982); *see also Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 141 U.S.App. D.C. 370, 375-76, 439 F.2d 477, 482-83 (1970) (relationships giving rise to a duty of protection include landlord to tenant, school district to student, employer to employee, and hospital to patient); *District of Columbia v. Doe*, 524 A.2d 30, 32 (D.C. 1987) (school to student). We are not inclined to extend the rationale of these decisions to the present case. Appellants have alleged no special relationship with the gun manufacturers and have suggested no reasonable way that gun manufacturers could screen the purchasers of their guns to prevent criminal misuse. *Delahanty*, 564 A.2d at 762.

Although our rejection of liability in *Delahanty* rested throughout on the absence of a direct link between the manufacture or distribution of handguns and injuries caused by the criminal misuse of those weapons, it is especially the refusal "to extend the rationale of [our] decisions" to the negligence theory alleged there that the plaintiffs must confront in asserting their claim of negligent distribution here. They first argue that the negligence discussion in *Delahanty* was *dictum* given the precise phrasing of the D.C. Circuit's question. The fact, however, that we "expand[ed] our inquiry"--as the certifying court foresaw we might--to render "an informed decision" on the reach of "established theories of tort law in the District of Columbia," *id.* at 760, does not make our analysis of any of those theories advisory. That reasoning would make an entire subset of answers to certified questions--*i.e.*, those in which we exercise the "latitude" given us to "consider[ ] nondesignated questions and [to] reformulat[e], if necessary, ... [the] questions as certified," *Penn Mut. Life Ins. Co. v. Abramson*, 530 A.2d 1202, 1207 (D.C. 1987)--non-binding *dicta*, contrary to our law that such answers are "*stare decisis* of this court." *Id.*

At bottom, the plaintiffs argue that *Delahanty* was wrongly decided, because, contrary to its holding, District of Columbia law requires no "special relationship between the parties" (such as that of landlord and tenant) to permit liability in negligence for criminal acts of others, so long as the defendant realized or should have realized the likelihood that his negligent conduct would cause foreseeable harm to the plaintiffs. Sitting en banc, we decline this invitation to overrule *Delahanty*. And we pass over the question whether a "special relationship" between a plaintiff and a defendant must undergird any claim of negligence in the District based on harm stemming directly from the criminal acts of third persons. *But see Workman v. United Methodist Comm.*, 355 U.S.App. D.C. 131, 135, 320 F.3d 259, 263 (2003) (surveying this court's decisions and concluding that under them "the requirement that the defendant [has] been able to foresee that a third party would likely commit a criminal act ordinarily has, and perhaps must have, a relational component"). We nevertheless conclude that our decisions addressing general tort concepts of duty and foreseeability do not permit recognition of a claim for common-law negligence on the facts alleged here.

Where an injury is caused by the intervening criminal act of a third party,

> this court has repeatedly held that liability depends upon a more heightened showing of foreseeability than would be required if the act were merely negligent. In such a case, the plaintiff bears the burden of establishing that the criminal act *was so foreseeable that a duty arises to guard against it.* Because of the extraordinary nature of criminal conduct, the law requires that the foreseeability of the risk be more precisely shown.

Potts v. District of Columbia, 697 A.2d 1249, 1252 (D.C. 1997) (citations and internal quotation marks omitted; emphasis added). In this context, then, the requisite duty of care required for negligence[3] is a function of foreseeability, arising only when foreseeability is alleged commensurate with "the extraordinary nature of [intervening] criminal conduct." *Id.*[4] And, as we further stated in *Potts,* "[o]ur opinions have made clear *the demanding nature of the requirement of 'precise' proof of a 'heightened showing of foreseeability'* in the context of an intervening criminal act involving the discharge of weapons." *Id.* (citations omitted; emphasis added). The high-water mark, as it were, of a showing of facts sufficient to create a duty to protect against such conduct was in *District of Columbia v. Doe,* 524 A.2d 30 (D.C. 1987), where the claim was that reasonable protective measures by the District of Columbia could have prevented a child from being raped

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[3] "[T]o establish negligence a plaintiff must prove a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, and damage to the interests of the plaintiff, proximately caused by the breach." *District of Columbia v. Harris,* 770 A.2d 82, 87 (D.C. 2001) (citations and internal quotation marks omitted).

[4] In *Workman,* the D.C. Circuit noted the theoretically somewhat anomalous blending of duty and foreseeability in this court's decisions ("Ordinarily, the relationship between the parties is the key to determining whether the defendant had a legally enforceable duty to the plaintiff (or her decedent), whereas foreseeability is important to issues of proximate causation and conformity to the standard of care, issues that arise only after a duty has been found."), but that nevertheless "the D.C. courts have repeatedly spoken of the heightened foreseeability requirement in terms of duty." 355 U.S. App. D.C. at 137, 320 F.3d at 265. We see no need to reconsider that framework of analysis in this case.

at a District elementary school. Acknowledging the requirement of a heightened showing of foreseeability in that context, *id.* at 33, we nonetheless identified evidence specific to that school and surrounding area that "could be viewed by reasonable factfinders as enhancing the foreseeability of danger from intruders, thereby creating a duty on the part of District officials to protect the students from this type of criminal activity." *Id.* at 34.[5] In three succeeding cases, by contrast, we rejected liability as a matter of law where foreseeability (hence duty) was not limited by any evidentiary reference to a precise location or class of persons.

In *Clement v. Peoples Drug Store,* 634 A.2d 425 (D.C. 1993), in which an employer was sued for negligence arising from the shooting death of one of its employees in the store parking lot, "the only evidence presented with respect to [the] shooting's foreseeability was an expert's opinion based on police reports of criminal activity in the surrounding area. No evidence was introduced involv[ing] any gun-related incidents at the particular shopping mall in which the shooting occurred." *Potts,* 697 A.2d at 1252 (summarizing basis for *Clement*'s holding). In *Bailey v. District of Columbia,* 668 A.2d 817 (D.C. 1995), where the plaintiff was shot after attending a cheerleading competition at a junior high school as she was leaving the building, she offered the affidavit of witnesses who asserted that the neighborhood around the school

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[5] In particular, there was evidence that "crimes against persons [had been committed] in and around the school ... [including] a robbery on the school's playground; sexual assaults and other violent activity [had occurred] in the surrounding area"; and the school security system was defective due to an open rear gate, doors that would not lock, and a malfunctioning intercom, permitting "adult males [to] freely roam [ ] throughout the school." *Doe,* 524 A.2d at 34.

was a "high drug area" and that shootings and other criminal acts had taken place there. Rejecting this showing as insufficient, we explained that "[a]lthough the occurrence of shootings in, and in the vicinity of, the District's public schools is an unhappy reality, ... such 'generic information,' by itself, does not create a duty on the part of the District to protect against the use of firearms under the circumstances presented here." *Id.* at 820.[6] Finally, in *Potts, supra,* the plaintiffs were injured by gunshots from an unknown source as they were leaving the Washington Convention Center (WCC) after attending a boxing event organized by Spencer Promotions, Inc. They sued the organizer and (among others) the District of Columbia for negligence. Relying principally on *Bailey* and *Clement,* we sustained a grant of summary judgment because "plaintiffs [had] proffered no evidence of any prior gun-related violence at any other event held at the WCC or promoted by Spencer Promotions, nor any other specific evidence bearing directly on the foreseeability of the shooting incident at issue here." 697 A.2d at 1252.

Potts, Bailey, and *Clement* were decided on summary judgment rather than a motion to dismiss, but they demonstrate the tight boundaries--requiring "'precise' proof of a 'heightened showing of foreseeability,'" *Potts,* 697 A.2d at 1252--within which a claim of common-law negligence must be framed in this jurisdiction "in the context of an intervening criminal act involving the discharge of weapons." *Id.* The plaintiffs in this case broadly allege a duty and foreseeable harm to "the District [of Columbia] and its residents." Complaint, ¶ 151. That duty is unlike even the one claimed

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[6] In particular, "there was no evidence of prior gun-related violence or assaults occurring at the school or [even] at any of the many cheerleading competitions that had been held anywhere in the city." *Bailey,* 668 A.2d at 821.

to be owed subclasses of residents (shoppers at a particular store, children at a given school, attendees of a particular event) regarding whom we have repeatedly said that "generic" proffers of foreseeability do not suffice to create a duty of care. The class to whom the defendants allegedly owed a duty here is potentially unlimited except by the population of the District of Columbia, any member of which could be a shooting victim. That indeterminacy, as other courts have recognized, results from the sheer number of ways in which firearms, despite any reasonable precautions manufacturers can be expected to take, may reach the hands of criminal wrongdoers--the sheer number of causal links, in other words, between the licensed manufacture and distribution of firearms and their use to kill or injure others. This court's decisions, we conclude, do not permit recognition of a common-law tort resting on such limitless notions of duty and foreseeability. *See also Lacy v. District of Columbia,* 424 A.2d 317, 320-21 (D.C. 1980) (citation and internal quotation marks omitted) (recognizing, as a matter of "policy," the existence in our law of "various liability-limiting considerations which relieve the defendant of liability for harm he actually caused where the chain of events appears highly extraordinary in retrospect").[7]

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[7] *District of Columbia v. Carlson,* 793 A.2d 1285 (D.C. 2002), does not help the plaintiffs. It concerned the District's duty to maintain in working condition traffic signals installed at intersections with pedestrian crosswalks. The main issue was whether the District could reasonably foresee "that a negligent driver might strike a pedestrian crossing the street" when the traffic light was not working. *Id.* at 1290. Unsurprisingly, the court held that it could, even though the driver technically had "violated a criminal statute" by failing to yield the right of way. *Id.* But we took pains to add that the driver's negligence "was not an intentional act," *id.*

[Footnote continued on next page]

Among courts rejecting claims of negligent distribution of firearms similar to the plaintiffs', the New York Court of Appeals in *Hamilton v. Beretta, U.S.A., Corp.*, 96 N.Y.2d 222, 727 N.Y.S.2d 7, 750 N.E.2d 1055 (2001), *leave to appeal denied,* 100 N.Y.2d 514, 769 N.Y.S.2d 200, 801 N.E.2d 421 (2003), has provided the most cogent analysis. Like our *Delahanty* decision, *Hamilton* answered certified questions of law from the federal Circuit Court, including whether under New York decisional law, "the defendants owed plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture." *Id.* at 1059. The federal District Court had "imposed a duty on gun manufacturers 'to take reasonable steps available at the point of ... sale to primary distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them.'" *Id.* at 1061 (citation omitted). The New York Court of Appeals rejected that duty as a basis for common-law negligence. Its prior decisions, like this court's, were "cautious ... in extending liability to defendants for their failure to control the conduct of others," a "judicial resistance to the expansion of duty [growing] out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another." *Id.* at 1061. Under the duty imposed by the District Court, by contrast, "[t]he pool of possible plaintiffs is very large--potentially, any of the thousands of victims of gun violence." *Id.* (footnote omitted). Moreover, the court reasoned,

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[Footnote continued from previous page]
at 1291, reflecting our awareness of how very different "the intervening act of another" was in *Carlson, id.* at 1290, from the unforeseeable criminal actions of third parties in *Potts, Bailey,* and *Clement.*

> the connection between defendants, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief. Such broad liability, potentially encompassing all gunshot crime victims, should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs.

Id. at 1061-62.

The court therefore rejected the plaintiffs' assertion of "a general duty of care aris[ing] out of the gun manufacturers' ability to reduce the risk of illegal gun trafficking through control of the marketing and distribution of their products," pointing out that to "impos[e] such a general duty of care would create not only an indeterminate class of plaintiffs but also an indeterminate class of defendants whose liability might have little relationship to the [social] benefits of controlling illegal guns." *Id.* at 1063.[8] Although the plaintiffs had "presented [the court] with a novel theory--negligent marketing of a potentially lethal yet legal product, based upon the acts not of one manufacturer, but of an industry--we

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[8] Another way of viewing it, the court said, was that no evidence had been offered "tending to show to what degree [the plaintiffs'] risk of injury was enhanced by the presence of negligently marketed and distributed guns, as opposed to the risk presented by all guns in society." *Hamilton,* 727 N.Y.S.2d 7, 750 N.E.2d at 1062.

are unconvinced," the court concluded, that "on the record before us[ ] the duty plaintiffs wish to impose is either reasonable or circumscribed." *Id.* at 1068.

The plaintiffs here point out that *Hamilton* was not decided on a motion to dismiss but only after a trial had shown the absence of proof "that the gun used to harm [the injured plaintiff] came from a source amenable to the exercise of any duty of care that plaintiffs would impose upon defendant manufacturers." *Id.* at 1062. But the plaintiffs in our case do not claim that through discovery they may be able "tangibl[y]" to show "that defendants were a *direct* link in the causal chain that resulted in plaintiffs' injuries," *id.* (emphasis added)--that, in the language of our cases, those injuries were foreseeable to the defendants in the "heightened" sense entailing "'precise proof' of knowledge and corresponding ability to prevent required by our decisions. *Potts, supra.* At most the plaintiffs allege that the defendants in the aggregate know that a sizeable number of the firearms they manufacture make their way, through dealer practices hey reasonably could limit, into the District of Columbia and into the hands of criminals, sometimes with "only a short time passing between the retail sale of a firearm outside the District and its criminal misuse in the District." Complaint, ¶ 123. Even if, as they claim, discovery may enable them to tie a particular weapon used to kill or injure a named plaintiff or his decedent to a particular manufacturer, they would still not have established a cognizable--*i.e.,* a "reasonable or circumscribed," *Hamilton, supra*--common-law duty to these plaintiffs rather than a duty to the class of all potential victims of gun violence in the District. They would not, in sum, have stated a claim under our decisions for common-law negligence based on injuries resulting from the criminal acts of third parties.

There is an additional reason why we decline to recognize the plaintiffs' claim for common-law negligence in the

distribution of firearms. The Council of the District of Columbia has intervened precisely in this area by enacting a strict liability statute governing the manufacture and sale of a subclass of firearms (assault weapons) whose lethal character, in its judgment, outweighs any social utility they may have. *See* D.C. Code § 7-2551.02. Under that statute, as we hold in part V, *infra,* the individual plaintiffs have stated a valid claim (and the District as well may have limited subrogation rights). In analogous circumstances, this court has refused to expand the boundaries of a common-law cause of action in tort. Specifically, in *Carl v. Children's Hosp.*, 702 A.2d 159 (D.C. 1997) (en banc), the full court adopted the tort of wrongful discharge as an exception to the traditional at-will doctrine governing termination of employment, where the discharge violates "a clear mandate of public policy." *Id.* at 164. Although we left future applications of the tort to be decided on a case-by-case basis, we stressed that any such application must be "carefully tethered to fundamental policies" implicit in "statute[s] or municipal regulation[s], or in the Constitution." *Id.* at 164. More important for present purposes, in succeeding cases divisions of the court have declined to apply this cause of action where the policy in question was not implicit--*i.e.*, embodied in some related statute--but rather was "explicit and [might] apply directly" through a statute expressly addressing the matter. *Freas v. Archer Servs., Inc.*, 716 A.2d 998, 1002 (D.C. 1998) (rejecting application of *Carl* as unnecessary where suit was based on statutorily banned and actionable retaliation for exercising rights under the Workers' Compensation Act); *see also McManus v. MCI Communications Corp.*, 748 A.2d 949, 957 (D.C. 2000) (noting and applying the court's previous rejection of "the argument ... that a public policy exception to the at-will doctrine applies to an alleged statutory violation"). That deference to the legislative role commends itself to us in this case as well. The existence of § 7-2551.02 reinforces our unwillingness to relax basic "liability-limiting" stan-

dards, *Lacy, supra,* of duty, foreseeability, and causal remoteness to recognize the cause of action for common-law negligence the plaintiffs advocate.[9]

IV. Public Nuisance

Much of what we have said so far explains why we also reject on the pleadings the claim for public nuisance brought by the District of Columbia alone. The RESTATEMENT (SECOND) OF TORTS § 821B (1) (1979) defines that tort as "an unreasonable interference with a right common to the general public." The District argues that this cause of action does not derive from its negligence claim, but is an independent cause of action with distinct elements, namely, (1) an interference with a public right (2) that is unreasonable. Although this court referred to that definition of the tort in *B & W Mgmt., Inc. v. Tasea Inv. Co.,* 451 A.2d 879 (D.C. 1982), the defendants and their amici argue that we have never recognized a public nuisance claim that did not involve either ownership (and control of) real property, criminal violations, or independently tortious conduct such as negligence--none of which is alleged, or sufficiently alleged, in this case.

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[9] *Cf. also Williams v. Baker,* 572 A.2d 1062, 1072 (D.C. 1990) (en banc), where in adopting the zone of danger test limiting the class of persons who may claim negligent infliction of emotional distress, the court explained:

> [T]his jurisdiction should not cast itself adrift on a sea of infinite foreseeability, subject only to such arbitrary limitation as we should impose.... [T]he issue of whether a plaintiff can recover damages for fear of harm to a third person is a question of policy for the court, not one to be determined on a case-by-case determination of whether the injury was foreseeable.

As an independent tort, claims of nuisance have indeed not been viewed favorably by this court. In recent cases we have even said that "nuisance is a type of damage and not a theory of recovery in and of itself," *Jonathan Woodner Co. v. Breeden,* 665 A.2d 929, 934 (D.C. 1995), so that recovery in such cases, "if at all, [must be] on the theory of negligence," *Bernstein v. Fernandez,* 649 A.2d 1064, 1072 (D.C. 1991) (citation and quotation marks omitted), or another theory such as intentional infliction of emotional distress. *Jonathan Woodner Co., supra.* The District argues that these statements were made in the context of claims for private, not public, nuisance but our decision in *Bernstein* noted that, "for the purpose of our holding in this case," the point did not depend on "whether the alleged nuisance is public or private." *Bernstein,* 649 A.2d at 1072 n. 8. Even the RESTATEMENT definition explains "nuisance" by "reference to two particular kinds of harm--the invasion of two kinds of interests[, public and private]--by conduct that is tortious *only if it falls into the usual categories of tort liability."* RESTATEMENT (SECOND) OF TORTS § 821A cmt. c (1979) (emphasis added).

The defendants here do not dispute, however, that a separate tort of public nuisance is cognizable in the District of Columbia, or that the RESTATEMENT provides the appropriate definition: "an unreasonable interference with a right common to the public." We accept the case before us on that basis. The question, nevertheless, is whether the District has sufficiently pleaded that cause of action, and the answer depends critically on how prepared we are to loosen the tort from the traditional moorings of duty, proximate causation, foreseeability, and remoteness that have made us reject the plaintiffs' claim of negligence. For the following reasons, we are not convinced that the public nuisance cause of action the District alleges is sufficiently distinguishable from its negligence claim to justify a different result.

The issue was defined pointedly by the majority and dissenting opinions in *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 761 N.Y.S.2d 192, *leave to appeal denied*, 100 N.Y.2d 514, 769 N.Y.S.2d 200, 801 N.E.2d 421 (2003), where the state's suit for public nuisance essentially mirrored the District's allegations in this case:

> Plaintiff's complaint ... claims that illegally possessed handguns are a common-law public nuisance because they endanger the health and safety of a significant portion of the population; interfere with, offend, injure and otherwise cause damage to the public in the exercise of rights common to all; and that, after being placed on actual and constructive notice that guns defendants sell, distribute and market are being used in crimes, they have, by their conduct and omissions, created, maintained and contributed to this public nuisance, because they manufacture, distribute and market handguns allegedly in a manner that knowingly places a disproportionate number of handguns in the possession of people who use them unlawfully. Plaintiff further claims that defendants are on notice that certain types of guns, and guns sold in certain locales, are disproportionately used in the commission of crimes.

Id. at 194. The dissent in *Sturm, Ruger* took the position that "[a] negligence analysis, with its requirement of the existence of a duty limited by concomitant considerations of proximate cause, foreseeability, fault, intent, and tempered by notions of the equitable apportionment of economic liability, is inapposite to an action for abatement of a public nuisance brought by the state in the proper exercise of its police powers." *Id.* at 208 (Rosenberger, J., dissenting).

The majority rejected that proposition, in large part "based on the reasoning and implications of *Hamilton v. Beretta,* [*U.S.A., Corp., supra*]." *Sturm, Ruger,* 761 N.Y.S.2d at 194. It determined that "much of the Court [of Appeals'] reasoning in dismissing the *Hamilton* negligent marketing complaint logically, and most aptly, applies to our consideration of this plaintiff's common-law public nuisance claim." *Id.* at 196. In particular, the *Hamilton* court's concern about "potentially limitless liability and about the unfairness of imposing liability for the acts of another" was "common to both negligent marketing and public nuisance claims," because to disregard "the existence, remoteness, nature and extent of any intervening causes between defendants' lawful commercial conduct and the alleged harm" would invite "a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities." *Id.* at 196-97. Whereas New York decisions validating public nuisance claims had "involve[d] specific harm directly attributable to defendant or defendant's activity," *id.* at 198 n. 2, the present complaint would "impose[ ] an undefined duty of care on handgun manufacturers and distributors," *id.* at 200, despite the "intervention of unlawful and frequently violent acts of criminals--over whom defendants have absolutely no control--who actually, directly, and most often intentionally, cause the cited harm." *Id.* at 199. The court concluded that the legislative and executive branches were "vastly better suited to address" the "societal problems associated with, or following, legal handgun manufacturing and marketing," "problems which may be as remote from a defendant's conduct and control as these." *Id.* at 203.

We agree with this reasoning, and are similarly unwilling to recognize a claim of common-law public nuisance that disregards, or greatly dilutes, the liability-limiting factors applied in part III, *supra.* The sheer number of causal links,

and resulting attenuation, that underlie the District's claim of injury from the defendants' invasion of a public right were described by the Supreme Court of Connecticut in a similar suit brought by the city of Bridgeport:

> The manufacturers sell the handguns to distributors or wholesalers and ... those sales are lawful because federal law requires that they be by licensed sellers to licensed buyers. The distributors then sell the handguns to the retailers, sales that, again, are required by federal law to be by licensed sellers to licensed buyers. The next set of links is that the retailer then sells the guns either to authorized buyers, namely, legitimate consumers, or, through the "straw man" method or other illegitimate means, to unauthorized buyers, sales that likely would be criminal under federal law. Next, the illegally acquired guns enter an "illegal market." From that market, those guns end up in the hands of unauthorized users. Next, either the authorized buyers misuse the guns by not taking proper storage precautions or other unwarned or uninstructed precautions, or the unauthorized buyers misuse the guns to commit crimes or other harmful acts. Depending on the nature of the conduct of the users of the guns, the plaintiffs then incur expenses for such municipal necessities as investigation of crime, emergency and medical services for the injured, or similar expenses. Finally, as a result of this chain of events, the plaintiffs ultimately suffer ... increased costs for various municipal services, ... injuries and deaths of Bridgeport's residents, ... and a negative impact on the ... abil-

> ity of the residents to live free from apprehension of danger.

Ganim v. Smith & Wesson Corp., 258 Conn. 313, 780 A.2d 98, 123-24 (2001).[10] The court rejected a claim of public nuisance brought by "a plaintiff situated as remotely from the defendants' conduct as these plaintiffs are, or who present[ ] a chain of causation as lengthy and multifaceted as these plaintiffs have." *Id.* at 133.

Other courts likewise have rejected public nuisance as a basis for holding gun manufacturers and distributors liable, either because they found no duty owed to the public at large to prevent guns from ending up in the hands of criminal wrongdoers, or for reasons of attenuation, remoteness, or inability of those defendants to control the nuisance. *See generally Tioga Pub. School Dist. # 15 v. United States Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) ("[L]iability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance."). The court in *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A., Corp.*, 273 F.3d 536 (3d Cir.2001), for example, recited "a chain of seven links" nec-

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[10] Like the Connecticut complaint, the District's public nuisance claim alleges that the "[d]efendants' ongoing conduct has created an ongoing public nuisance of readily available handguns and machines guns ... that unreasonably interferes with District residents' enjoyment of health, safety, and peace .... As a result of the continued possession and use of these firearms, residents of the District will be killed and injured, and the public will continue to fear for its health, safety, and welfare and will be subjected to conduct that creates a reasonable apprehension of danger to person and property." Complaint, ¶ 164.

essary to "connect the manufacture of handguns with municipal crime-fighting costs," and held that

> [t]his causal chain is simply too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim. In the initial steps, the manufacturers produce lawful handguns and make lawful sales to federally licensed gun distributors, who in turn lawfully sell those handguns to federally licensed dealers. Further down the chain, independent third parties, over whom the manufacturers have no control, divert handguns to unauthorized owners and criminal use.

Id. at 541. The same court in *City of Philadelphia v. Beretta, U.S.A., Corp.*, 277 F.3d 415 (3d Cir. 2002), rejected the city's attempt "to shorten the causal chain by arguing that the 'thriving illegal market ... injures [it], even before any guns acquired in the illegal market are actually used in the commission of a crime.'" *Id.* at 424. This assertion, the court explained, "does not reduce the links that separate a manufacturer's sale of a gun to a licensee and the gun's arrival in the illegal market through a distribution scheme that is ... lawful" and a succession of unlawful third-party acts (such as straw purchases) "likely [to be] ... long[ ] and ... varied." *Id.* (footnote omitted).

Most recently, the Supreme Court of Illinois unanimously rejected a public nuisance claim by the City of Chicago almost identical to the one made here (unlike in the present suit, the defendant-class there included retail gun dealers as well as manufacturers and distributors). *See City of Chicago v. Beretta, U.S.A. Corp.*, 213 Ill.2d 351, 290 Ill. Dec. 525, 821 N.E.2d 1099 (2004). Recognizing first that the gun manufacturers and distributors were "highly regulated by state or federal law," the court held that a claim for public nuisance could be brought against them only if, at a mini-

mum, they had negligently conducted their business operations, which in turn presupposed that they owed a duty to the Chicago public "to exercise reasonable care to prevent their firearms from ending up in the hands of persons who use and possess them illegally in the City of Chicago." *Id.* at 1109. The court found no such "duty [of the manufacturers and distributors] owed to the public at large," explaining:

> It is reasonably foreseeable, in a nation that permits private ownership of firearms, that criminals will obtain guns and it is not only likely, but inevitable, that injuries and death will result. It is less foreseeable to these defendants that the criminal conduct of individuals who illegally take firearms into a particular community will result in the creation of a public nuisance there. Further, despite plaintiffs' suggestion that the only burden they would place on defendants is the loss of sales to criminals, the magnitude of the burden that plaintiffs seek to impose on the manufacturer and distributor defendants by altering their business practices is immense. Finally, plaintiffs predict only positive consequences if this duty is recognized--the city will be safer and lives will be saved. *Such positive consequences are speculative at best, being based on the assumption that criminals will not be able to obtain guns manufactured by other companies and sold by other dealers.* The negative consequence of judicially imposing a duty upon commercial enterprises to guard against the criminal misuse of their products by others *will be an unprecedented expansion of the law of public nuisance.*

Id. at 1126 (emphasis added).

Even as to the retail dealer defendants, alleged (*inter alia*) to have sold firearms regularly to Chicago buyers although "the words or behavior of the buyers indicate[d] an intention to use the weapon illegally," *id.* at 1107, the Illinois court rejected the claim that they were the "legal cause" of the public nuisance alleged. The court pointed to "the link between the questions of the existence of a duty and the existence of legal cause" inasmuch as "[b]oth depend on an analysis of foreseeability." *Id.* at 1136. It noted that it was "not faced with the question of whether a gun dealer might be held liable for negligently entrusting a weapon to an individual buyer when it is foreseeable that the buyer might allow a third party to possess or use the gun illegally." *Id.* at 1137. Rather, the "plaintiffs argue that it is foreseeable to these defendants that the aggregate effect of numerous sales transactions occurring over time and in different multiple locations operated by businesses with no ties to each other will result in the creation of a public nuisance in another city." *Id.* The court responded that "it is not at all clear that [this] condition would cease to exist even if these particular defendants entirely ceased selling firearms":

> The manufacture and sale of firearms is legal. There is a market for these products that is served by thousands of dealers all across the country. The sales that would otherwise have been made by these dealers would be made by others. Ultimately, there would be a shift in market share between these dealers and others and, perhaps, an increase in the price of illegal weapons "on the street" as those intent on illegal ownership had to go further afield in search of weapons to buy.

Id. As in the case of the manufacturers and distributors, the court found that "the consequences of imposing a duty upon the dealer defendants to prevent the creation of a public nui-

sance in the city of Chicago by those intent on illegally possessing and using guns in the city are ... far-reaching." *Id.* at 1138. It concluded:

> [T]he alleged public nuisance is not so foreseeable to the dealer defendants that their conduct can be deemed a legal cause of a nuisance *that is the result of the aggregate of the criminal acts of many individuals over whom they have no control.* This is one of those "instances in which a party may have contributed in some remote way [to the harm] and yet it is inappropriate to subject that party to tort liability."

Id. (quoting *Sturm, Ruger,* 761 N.Y.S.2d at 202) (emphasis added; internal quotation marks omitted).

Applied to the manufacturer and distributor defendants before us, we agree with the Illinois court's analysis. The District contends that these defendants are aware of, and in some ways even complicit in, the practices of certain "notorious" gun dealers in the counties surrounding the District of Columbia who sell firearms indiscriminately (particularly through straw sales) to persons they know or should know intend to use or possess them in the District of Columbia. But even assuming that the defendants can be said to exercise some control over the business practices of those independent dealers, the District has not alleged--any more than did the plaintiffs in *City of Chicago*--reason to believe that the exercise of that control would abate the nuisance of guns unlawfully in the hands of persons in the District to any perceptible degree. Deplorable though these facts may be, the ready availability of firearms in the nation at large, and the sheer number and variety of opportunities by which persons intent on acquiring them unlawfully can do so, counsel strong restraint on the part of a court asked to hold defendants--individual or corporate--answerable for a common-law nui-

sance that "result[s from] the aggregate of the criminal acts of many individuals over whom they have no control." *City of Chicago,* 290 Ill. Dec. 525, 821 N.E.2d at 1138. In keeping with our own decisions and others we have found persuasive, we decline to relax the common-law limitations of duty, foreseeability, and direct causation so as to recognize the broad claim of public nuisance the District has alleged.

In this regard, moreover, what we stated at the end of our discussion of negligence, part III, *supra,* remains pertinent: The legislature, by enacting D.C. Code § 7-2551.02, has eased the liability-limiting elements of traditional tort law to create a cause of action against gun manufacturers and distributors for injuries to individuals caused by a particular class of lethal firearms having little or no social utility. In these circumstances, we are doubly unpersuaded of the necessity or wisdom of adopting judicially a right of action for public nuisance applied to the manufacture and sale of guns generally, where an effect may be a proliferation of lawsuits "not merely against these defendants[ ] but ... against ... other types of commercial enterprises"--manufacturers, say, of liquor, anti-depressants, SUVs, or violent video games--"in order to address a myriad of societal problems ... regardless of the distance between the 'causes' of the 'problems' and their alleged consequences." *Sturm, Ruger,* 761 N.Y.S.2d at 203.

V. Strict Liability

In Count I, the plaintiffs all have brought suit under D.C. Code § 7-2551.01 *et seq.* (2001, the Assault Weapon Manufacturing Strict Liability Act of 1990 (the "SLA" or "Act"). The operative provision of the statute, § 7-2551.02, states:

> Any manufacturer, importer, or dealer of an assault weapon or machine gun shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately

> results from the discharge of the assault weapon or machine gun in the District of Columbia.

The SLA defines "assault weapon" to include a number of specific products, and invests "machine gun" with the same meaning defined in D.C. Code § 7-2501.01(10), *i.e.*, "any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot: (A) Automatically, more than 1 shot by a single function of the trigger; [or] (B) Semiautomatically, more than 12 shots without manual reloading." In enacting the SLA, the D.C. Council understood assault weapons to "include both automatic and semi-automatic weapons," as well as "some handguns and rifles," a class of weapons it found have little or no social benefit but at the same time pernicious consequences for the health and safety of District residents and visitors. *See* SLA § 2(2), D.C. Law 8-263 [Act 8-289], § 2, 37 DCR 8482 (Dec. 28, 1990) (hereafter "Findings").

The trial court dismissed this count as to all defendants, concluding that (1) the statute provides no cause of action to the District of Columbia and (2), in any case, (a) the plaintiffs failed to state a claim within the Act and (b) the SLA is an unconstitutional attempt at extraterritorial regulation, violating both the Commerce Clause and principles of due process. We therefore confront three issues:

> A. Does the SLA, or any other statute by implication, give the District of Columbia a right of recovery for liability under the SLA;
>
> B. Did the complaint sufficiently plead the defendants' liability to the plaintiffs under the SLA; and, if so,
>
> C. Does the SLA impermissibly burden interstate commerce or violate due process?

We answer these questions in order.

A. District of Columbia

"The text of an enactment is the primary source for determining its drafters' intent." *Stevenson v. District of Columbia Bd. of Elections & Ethics,* 683 A.2d 1371, 1376 (D.C. 1996) (citation and quotation marks omitted). "In the ordinary case, absent any indication that doing so would frustrate [the legislature's] clear intention or yield patent absurdity, our obligation is to apply the statute as [the legislature] wrote it." *Hubbard v. United States,* 514 U.S. 695, 703, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995) (citation and internal quotation marks omitted); *see also Peoples Drug Stores, Inc. v. District of Columbia,* 470 A.2d 751, 753-54 (D.C. 1983). At the same time, we do not read statutory words in isolation; the language of surrounding and related paragraphs may be instrumental to understanding them. *See Carey v. Crane Serv. Co.,* 457 A.2d 1102, 1108 (D.C. 1983). "Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, language ..., structure, and subject matter." *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am.,* 508 U.S. 439, 455, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993) (citation and internal quotations marks omitted).

Applying these standards, we hold that the SLA confers a right of action on individuals who are injured, but not the District of Columbia. The statute makes manufacturers and others strictly liable in tort "for all direct and consequential damages that arise from *bodily injury or death* if the bodily injury or death proximately results from the discharge of" one of the enumerated firearms. Section 7-2551.02 (emphasis added). Bodily injury or death self-evidently can happen only to individual persons, not corporate entities. Surrounding provisions of the statute confirm the purpose to give redress to individuals. The statute does "not operate to limit in scope any cause of action, other than that provided by this [subchapter], available to a *person* injured by an assault

weapon." Section 7-2551.03(c) (emphasis added). And, it affords no right of action to "a *person* injured by an assault weapon while committing a crime," or to one seeking recovery "for a *self*-inflicted injury" resulting from "a reckless, wanton, or willful discharge of an assault weapon." Section 7-2551.03(b) & (e) (emphases added). The subject of these provisions, then, is a right of action--granted, preserved, or withheld--of individuals, not government, to sue for damages arising from bodily injury or death traceable to assault weapons.[11]

In its brief to the division, the District distinguished between the verb the legislature used--"arise from"--and others it might have used if it meant to restrict the class of those entitled to recover damages to individuals. "Individuals' injuries," the District reasoned, "are the source of the District's damages under the SLA, including the costs of law enforcement and healthcare services that 'arise from' the 'bodily injury or death' of individuals." Br. for D.C. to Div. at 38; *see also* Reply Br. for D.C. to Div. at 23 (claiming a right under the SLA "to recover the expenses that it [has] incurred for law enforcement, health-care services, paid leave of employees, and other services" attributed to gun violence). But one need only consider the magnitude--the unboundedness--of such "damages" to realize the implausibility of the argument

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[11] The legislative findings accompanying the Act reinforce this point, stating (among other things) that the manufacture and distribution of assault weapons "expos[es] the citizens [of] and visitors to the District [of Columbia] to a high degree of risk of serious harm," and "[a]s between the manufacturer or dealer of an assault weapon on the one hand and *the innocent victim* of the discharge of an assault weapon on the other hand, the manufacturer or dealer is more at fault than the victim." Findings (14) & (15), 37 DCR at 8483 (emphasis added).

that the Council provided for them in the SLA by its choice of a verb and nothing else. "Arise from" may well connote a causal relation less direct and immediate than, say, "result from," but to freight it with a legislative intent to include the vast array of law enforcement costs and governmental health-care services attributable to assault weapon injuries as recoverable under the statute demands far more than the verb alone can ear. Neither it nor the addition of "consequential" to the "direct" damages recoverable expands, in our judgment, the class of those given a cause of action by the SLA.

The District asserts, however, an additional and more limited claim for damages that we conclude has validity. The complaint alleges that in addition to the right of action the SLA gives the District (a claim we have rejected), the District may recover under two other statutes the medical and related expenses it has incurred as a result of third-party wrongful conduct. Specifically, D.C. Code § 4-601 *et seq.* (2001), the Health-Care Assistance Reimbursement Act of 1984 (HCARA), grants the District "an independent, direct cause of action against [a] third party for the unreimbursed value or cost of ... health-care assistance," whenever the District has "provide[d] health-care assistance to a beneficiary who has suffered an injury or illness under circumstances creating liability in [that] third party." *Id.* § 4-602(a). "Beneficiary" means "any individual who has received health-care assistance from the District and, if applicable, that individual's guardian, conservator, personal representative, estate, dependants, and survivors." *Id.* § 4- 601(1). Another statute, D.C. Code § 5-601 *et seq.* (2001), the Medical Care Recovery Act of 1978 (MCRA), similarly gives the District a "right to recover" health-care and funeral expenses it has paid for police officers and firefighters, and the costs of their extended absence with pay, from third-parties whose tortious conduct resulted in injuries to those employees. *Id.* § 5-602.

Applied to this case, both statutes effectively give the District rights of "legal subrogation," D.C. Code § 4-602(b), to claims a beneficiary or specified District employee may have against a defendant under the SLA. Relying on these provisions, the complaint alleges that as a proximate result of the defendants' conduct, the District "has incurred and will incur costs that are recoverable under [the HCARA and the MCRA] including: (1) health care costs and Medicaid expenses in treating victims of gun violence ...; (2) costs of care and treatment provided to officers and members of the Metropolitan Police Department and the Fire Department of the District of Columbia [injured by guns] ...; and (3) leave of absence wages and other assistance and compensation paid or to be paid police officers and firefighters ... on account of their having suffered gun injuries." Complaint, ¶ 137. None of the currently named plaintiffs fits the latter two categories, but two appear to fall within the first. Thus, as to the plaintiff Bryant Lawson, the complaint alleges that as a result of injuries he suffered from bullets "most likely ... fired by a 'machine gun' ... manufactured, imported, or sold by one of the [d]efendants," Complaint, ¶ 56, he "relied on Medicaid to pay for the surgery, hospitalization, medications, and rehabilitation he needed because of his gunshot wounds" and he "continues to rely on Medicaid to treat the frequent problems that result from his being a quadriplegic." Complaint, ¶ 58. Regarding a second plaintiff, Gregory Ferguson, the complaint alleges that as a proximate cause of having been struck by bullets from an AK-47-type weapon, he "spent several days in D.C. General Hospital and over a year in physical therapy." As to these individuals, the HCARA authorized the District to "[i]ntervene ... in [this] proceeding brought by the beneficiary," D.C. Code § 4-604(a)(2), to attempt to re-

cover nonreimbursed medical expenses incurred by the District for treatment. It should be viewed as having done so, and ay remain in the case for that purpose.[12]

B. Rule 12(b)(6)

By its terms, § 7-2551.02 requires proof tying an assault weapon or machine gun that causes death or bodily injury to a particular manufacturer, importer, or dealer ("Any manufacturer, [etc.] of *an* assault weapon ... shall be held strictly liable ... if the bodily injury ... proximately results from the discharge of *the* assault weapon" (emphasis added)). The trial court dismissed the individual plaintiffs' claims under the statute because none of the plaintiffs could identify in the complaint "which defendant and corresponding [machine gun or assault weapon] was involved in their respective injury or death of the relevant decedent." The court acknowledged that "[t]he involvement of a recovered weapon might potentially moot many of the legal deficiencies associated with the plaintiffs' reliance on the [SLA]," but concluded that since "*none* of the individual plaintiffs bases his or her case on weapons that were actually recovered, their claims are pled on pure speculation" (emphasis in original). In our view, requiring the plaintiffs to identify with particularity the weapons that caused their injuries and the manufacturers of those weapons at this early stage of the proceedings is contrary to

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[12] Indeed, exercising its additional right to "[i]nstitute and prosecute a proceeding alone (in its own or the beneficiary's name) or in conjunction with the beneficiary" to recover such expenses, D.C. Code § 4-603(a)(3), the District is free to move to amend the complaint in conformity with the rules to include other beneficiaries with claims under the SLA whose identity has come to light during these proceedings.

the usual rules of pleading, and does not justify dismissal under Rule 12(b)(6).

In substance, each individual plaintiff alleged that the injuries of which he or she complains were caused by an assault weapon or a machine gun as defined by the SLA.[13] "Under conventional liberal rules of 'notice' pleading," *West v. Morris,* 711 A.2d 1269, 1271 (D.C. 1998); *see* Super. Ct. Civ. R. 8(a), those allegations were sufficient to state a claim because dismissal under Rule 12 is proper only if it is apparent "beyond doubt the plaintiff [s] can prove no set of facts in support of [their] claim[s] which would entitle [them] to relief." *Owens v. Tiber Island Condo. Ass'n,* 373 A.2d 890, 893 (D.C. 1977). *See also Diamond v. Davis,* 680 A.2d 364, 371 (D.C. 1996) ("Under the Superior Court Civil Rules ... the plaintiff need only plead facts sufficient to put the defendants on notice of the claims brought against them. A plaintiff need not plead his evidence at all.") (internal citation omitted); *Vincent v. Anderson,* 621 A.2d 367, 372 (D.C. 1993) (issue of "whether or not appellant[s] had available evidence sufficient to prove the allegations in [their] complaint" "really had nothing to do with the legal sufficiency of

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[13] For example, the complaint alleged that Andre Wallace, the son of plaintiff Laura Wallace, and Natasha Marsh, the daughter of plaintiff Madilia Marsh-Williams, were shot and killed by three men, at least one of whom was armed with a 9mm pistol. Complaint, ¶ 82. Nine-millimeter bullets were recovered from the bodies of both victims. Complaint, ¶ 87. "On information and belief, the bullets that killed Wallace and Marsh were fired by a 'machine gun' or 'assault weapon' as those terms are defined by the Strict Liability Act." *Id.* Only the plaintiff Lawson qualified his allegation by stating that he was "most likely" shot by a weapon covered by the Act, but that does not affect the sufficiency of the allegation.

the complaint"). The trial court found "no excuse for [each plaintiff's] inability to assert which defendant's weapon was used to harm him, if this fact is knowable at all," but that criticism is premature, as is the court's comment that the defendant manufacturers and distributors "surely have no access to the weapons that were physically associated" with the individual plaintiffs' claims. The plaintiffs point to several avenues for linking a firearm to a particular manufacturer that may be open to them in discovery, and even if all seem "speculative" to us as a way of arriving at that link, none may be rejected at this stage. *See Arnold v. Moore,* 980 F. Supp. 28, 37 (D.D.C. 1997) (dismissal inappropriate even though prisoner-plaintiff had "fail[ed] to identify or name the [individual prison-officer] defendants who allegedly assaulted [him]"; "[i]f, after discovery, the plaintiff still has not provided the names of the defendant ... officers ..., the Court may make a determination at that time whether ... judgments should be granted in favor of the defendants"); *and see, by contrast, Bly v. Tri-Cont'l Indus., Inc.,* 663 A.2d 1232, 1236 (D.C. 1995) (summary judgment properly granted manufacturers *after discovery* for "lack of evidence as to which of [defendant's] products" caused plaintiffs' injuries).

In *Conley v. Gibson,* 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), the Supreme Court stated:

> [A]ll the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which its rests.... Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of [Fed. R.

> Civ. P.] Rule 8(f) that "all pleadings shall be so construed as to do substantial justice,"[14] we have no doubt that [plaintiffs'] complaint adequately set forth a claim and gave the [defendants] fair notice of its basis.

Id. at 47-48, 78 S. Ct. 99 (footnotes omitted). Although we are less certain in this case about the adequacy of the complaint under these principles, we likewise follow Rule 8(f)'s command in holding that the plaintiffs have satisfied the pleading requirements of Rule 8. At the same time, however, if they are unable after discovery to tie a particular defendant to a particular injury-producing weapon, they will not be entitled to proceed under the Act against that defendant.

C. Constitutional Challenges

Acts of the legislature are presumptively valid, *see Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984), and thus a court may invalidate an otherwise lawful enactment "only upon a plain showing that [the legislature] has exceeded its constitutional bounds." *United States v. Morrison,* 529 U.S. 598, 607, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000). Nevertheless, the defendants argue that the SLA violates both the Commerce Clause and due process principles applicable to the District through the Fifth Amendment. In essence their argument is that, by imposing strict liability on firearms manufacturers for conduct that is wholly lawful where it takes place--*i.e.*, the lawful manufacture, production and distribution of firearms outside of the jurisdiction of the statute--the SLA impermissibly burdens the lawful interstate commerce of firearms and "arbitrarily" attempts to impose a regulatory scheme beyond the boundaries of the jurisdiction enacting it. We consider first the

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14 *See* Super. Ct. Civ. R. 8(f).

Commerce Clause argument, then the claim of violation of due process. Neither argument persuades us.

1. Commerce Clause

"Though phrased as a grant of regulatory power to Congress, the [Commerce] Clause has long been understood to have a 'negative' [or dormant] aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys. v. Department of Envtl. Quality,* 511 U.S. 93, 98, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994); *see District of Columbia v. Eastern Trans-Waste of Md., Inc.,* 758 A.2d 1, 16 (D.C. 2000). Of course, "[l]egislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *Head v. New Mexico Bd. of Exam'rs in Optometry,* 374 U.S. 424, 428, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963) (citations and internal quotation marks omitted). In particular, "the Constitution when conferring upon Congress the regulation of commerce, ... never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Id.* (internal quotation marks omitted). Under the "two-tiered approach" adopted by the Supreme Court,

> [w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the [s]tate's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986) (citations omitted).

The vice against which the first, or anti-discrimination, component of this test operates is "local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Town of Clarkstown, New York,* 511 U.S. 383, 390, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994). No serious argument is made that the SLA exhibits economic protectionism. Because there *are* no legal manufacturers, distributors, or sellers of assault weapons and machine guns in the District of Columbia,[15] the SLA does not discriminate in favor of in-state business or economic interests against their out-of-state counterparts. *See Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 125, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978) ("[S]ince there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless."). And, contrary to what the defendants do argue, the SLA does not "directly regulate[ ] ... interstate commerce." *Brown-Forman Distillers Corp.*, 476 U.S. at 579, 106 S. Ct. 2080. It does not regulate in any direct sense, but instead imposes liability in tort for harm caused by an abnormally dangerous subset of firearms; and it limits that right of action to injuries incurred in the District of Columbia. It may have *effects* outside of the District if manufacturers alter their business practices to avoid that liability, but "[l]egislation ... may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *Head,* 374 U.S. at

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15 The manufacture and distribution of machine guns is prohibited in the District, D.C. Code § 7-2504.01 (2001), as is their possession. *Id.* §§ 7-2502.01 & -2502.02(a)(2).

428, 83 S. Ct. 1759 (citation and internal quotation marks omitted). *See Sherlock v. Alling,* 93 U.S. 99, 103, 23 L. Ed. 819 (1876) (state statute "declar[ing] a general principle respecting the liability of all persons within the jurisdiction of the State for torts resultin[g] in the death of parties injured" does not offend the dormant Commerce Clause); *Stone v. Frontier Airlines, Inc.,* 256 F. Supp. 2d 28, 46 (D. Mass. 2002) (rejecting argument that "the dormant Commerce Clause precludes state tort law from regulating any activity that, while having local effects, also effectuates some external consequences").

The defendants rely primarily on *Brown-Forman, supra,* and *Healy v. The Beer Institute,* 491 U.S. 324, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989), both of which struck down state price control or "price affirmation" statutes that had "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State" that enacted them. *Id.* at 337, 109 S. Ct. 2491. But in contrast to these statutes, the Strict Liability Act "does not regulate the price of any out-of-state transaction, either by its express terms or by *its inevitable effect." Pharmaceutical Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 669, 123 S. Ct. 1855, 155 L. Ed. 2d 889 (2003) (emphasis added; internal quotation marks omitted). That the risk it creates of damage awards in the District may conceivably affect the defendants' pricing or insurance decisions related to a limited class of the products they manufacture is not the "direct[ ] control[of] commerce," *Healy,* 491 U.S. at 336, 109 S. Ct. 2491 that the Commerce Clause forbids without more.

The validity of the SLA thus depends on whether it "imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'" *C & A Carbone, Inc.,* 511 U.S. at 390, 114 S. Ct. 1677 (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)). State regulation on subjects "relating

to the health, life, and safety of ... citizens," *Head,* 374 U.S. at 428, 83 S. Ct. 1759 receives special deference in that analysis. *See Smith v. District of Columbia,* 436 A.2d 53, 58 (D.C. 1981); *Electrolert Corp. v. Barry,* 237 U.S. App. D.C. 328, 331, 737 F.2d 110, 113 (1984). The "benefits" of the SLA to the District of Columbia are reflected in the legislative findings that accompanied its passage. The D.C. Council found (a) that "the increase in homicides in the District has been accompanied by a proliferation of use of assault weapons (*i.e.,* automatic and semi-automatic guns) in the community," with "[s]emi-automatic handguns represent[ing] a growing percentage of the handguns recovered by the [police and] ... involved in handgun crime"; (b) that "[a]ssault weapons, and the manufacture and distribution of assault weapons are abnormally and unreasonably dangerous, and pose risks to the citizens of and visitors to the District which far outweigh any benefits that assault weapons may bring"; (c) that "[i]t is foreseeable by manufacturers and distributors of assault weapons that the criminal or accidental use of assault weapons will cause injury and death"; and (d) that the manufacture and distribution of these weapons "are among the proximate causes of the rising number of homicides in the District, exposing the citizens [of] and visitors to the District to a high degree of risk of serious harm." Findings (9), (10), (12), (13), & (14), 37 DCR 8483. The legislation, in short, addresses a pressing concern for public safety by giving innocent victims of gun violence in the District a cause of action against manufacturers or dealers for injuries caused by particularly dangerous firearms whose destructiveness far outweighs any legitimate utility they have.

In contrast to this strong governmental interest, any effect the SLA would have on interstate commerce is "incidental ... [and not] clearly excessive in relation to the ... local benefits." *Pike,* 397 U.S. at 142, 90 S. Ct. 844. Only firearms the Council has classified as "abnormally and unreasonably dangerous"--those designed essentially to kill or in-

timidate, and for no other purpose in private hands--are covered by the Act, and liability attaches only for death or injuries resulting from the discharge of one of these weapons in the District of Columbia--and then only when the link has been established between a specific manufacturer and the gun that caused the injury. Moreover, assault weapons "originally distributed to a law enforcement agency or ... officer" are excluded from the statute's reach, § 7- 2551.03(a), as are firearms used by persons injured while committing crimes or who injured themselves.[16] Section 7-2551.03(b), (e). Given these limitations, it is not apparent to us why the SLA's effect on interstate commerce is greater than that of other state laws imposing liability in tort on manufacturers of defective or abnormally dangerous products. *See, e.g., Tigue v. E.R. Squibb & Sons, Inc.*, 136 Misc.2d 467, 518 N.Y.S.2d 891, 897 (N.Y. Sup. Ct. 1987), *aff'd*, 139 A.D.2d 431, 526 N.Y.S.2d 825 (1988), *aff'd sub nom. Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069 (1989) (holding that relaxation of the traditional product identification requirement in tort law to provide a forum to innocent victims of the drug DES was not a "clearly excessive" burden "in relation to the putative local benefits" and, hence, was not violative of the Commerce Clause). The defendants profess alarm that the SLA, if upheld, will require them to alter their legal business practices on a national and international level. But given the limitations on the reach of the Act we have described, that fear seems fanciful, especially since it stems mainly from concern with the broader remedies the plaintiffs have sought--*i.e.*, injunctive and "abatement" relief--for the alleged negligence and public nui-

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[16] To that extent, the statute incorporates the common-law defense of assumption of risk.

sance,[17] claims we have rejected here. In any event, the fact that exposure to "product liability in tort, whether strict or otherwise," may also

> affect commercial decisions by actors in other states, such as ... manufacturers, does not implicate the Commerce Clause. Differences in the conditions and risks of doing business from state to state are in part the inevitable result of *any* state economic regulation, but the effects that these differences have on commercial decisions, even those that involve interstate trade, are not by themselves nearly so direct as to 'affect commerce' in the constitutional sense.

Bowman v. Niagara Mach. & Tool Works, Inc., 832 F.2d 1052, 1056 (7th Cir.1987) (emphasis in original).

2. Due Process

"A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument." *Young v. Masci*, 289 U.S. 253, 258, 53 S. Ct. 599, 77 L.Ed. 1158 (1933). As we have seen, the SLA imposes liability on out-of-state manufacturers of firearms (there are none in the District) for injuries caused to innocent persons from the "discharge of [an] assault weapon or machine gun *in the District of Columbia.*" D.C. Code § 7-

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[17] *See* Br. for Appellees to Div. at 71 ("By the injunctive relief or 'abatement' they request, plaintiffs ultimately seek broad reforms in defendants' national and international business practices according to plaintiffs' own policy preferences.").

2551.02 (2001) (emphasis added). The defendants nevertheless argue that the SLA constitutes an attempt by the District to impose its own policy choices as to gun regulation on other states where the manufacture of machine guns is lawful, thereby violating due process. They rely principally on *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)--or more precisely on two sentences from *Gore.* The first is the Court's statement that "it follows from ... principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572, 116 S. Ct. 1589. The second, providing the due process link, is that "'[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.'" *Id.* at 573 n. 19, 116 S. Ct. 1589 (citation omitted).

The defendants first of all confuse punishment--and the issue of punitive damages before the Court in *Gore*--with a state's authority to permit compensation to victims for injuries suffered within its jurisdiction. In *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), which also dealt with punitive damages and applied *Gore,* the Court made that distinction explicit. *See id.* at 416, 123 S. Ct. 1513 (explaining the "different purposes" served by compensatory and punitive damages). One looks in vain in either *Gore* or *State Farm* for a suggestion that a state may not permissibly decide that certain products, whether manufactured within or outside a state, are so dangerous that their manufacturers should face strict liability in tort for injuries the products contribute to within the State. *Gore,* in fact, affirmed a state's right to impose "economic penalties" on out-of-state manufacturers, "whether the penalties take the form of legislatively authorized fines or judi-

cially imposed punitive damages," so long as such penalties are "supported by the State's interest in protecting its own consumers." *Gore*, 517 U.S. at 572, 116 S. Ct. 1589.[18] Under *Gore*, the SLA would violate due process only if it penalized manufacturers "for conduct that was lawful where it occurred *and that had no impact on* [*the District*] *or its residents.*" *Id.* at 573, 116 S. Ct. 1589 (emphasis added); *see also State Farm*, 538 U.S. at 422, 123 S. Ct. 1513 (for punitive damage purposes, "[l]awful out-of-state conduct may be probative" if it has "a nexus to the specific harm suffered by the plaintiff"). In sum, no due process issue is raised by legislation that seeks to redress injuries suffered by District residents and visitors resulting from the manufacture and distribution of a particular class of firearms whose lethal nature far outweighs their utility. *See, e.g., City of Boston v. Smith & Wesson Corp.*, 66 F. Supp. 2d 246, 250 (D. Mass. 1999) ("As plaintiffs here are seeking relief only on behalf of injured parties in Massachusetts, the holding of the *Gore* case does not apply.").

VI. Conclusion

For the foregoing reasons, the judgment of the Superior Court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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[18] The SLA does not provide for any award of punitive damages; by its terms it permits recovery only for "all direct and consequential damages." D.C. Code § 7-2551.02.

WAGNER, Chief Judge, concurring, in part, and dissenting, in part.

In my view, the trial court properly dismissed the individual plaintiffs' claims under the Strict Liability Act, D.C. Code § 7-2551.02 (the Act) set forth in their Third Amended Complaint.[1] Under this Act, a manufacturer, importer or dealer of an assault weapon is subject to liability *without fault* only if a plaintiff's injuries proximately resulted from the discharge of one of the weapons of that particular manufacturer, importer or dealer. D.C. Code § 7-2551.02. In this case, as the trial court concluded, plaintiffs did not allege that any one of the twenty-five (25) named defendants and one to one-hundred (1 to 100) DOE defendants is a manufacturer, importer or dealer of the weapon that actually caused them harm.[2] Even at the en banc argument, counsel for plaintiffs/appellants had to concede that they still cannot tie any of the individual defendants to a weapon that caused harm to any one of them. Thus, plaintiffs did not and cannot plead the predicate facts to hold any of the named defendants liable for their injuries under the Act. The failure to allege an essential element of the cause of action created by the Act is fatal to plaintiffs' pleading, and defendants are entitled to dismissal under our rules and precedents. *See* Super. Ct. Civ. R. 12(b)(6) (failure to state a claim on which relief can be granted); *see also Bible Way Church v. Beards*, 680 A.2d

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[1] Each of the amended complaints added party plaintiffs.

[2] The complaint alleges that plaintiffs do not know the status of the 1 through 100 DOE defendants, but that each has "engaged in the business of manufacturing, importing, marketing, distributing, selling, or dealing in firearms" and that "[e]ach regularly sells or solicits the purchase of its firearms in the District or derives substantial revenue from firearms used or consumed in the District."

419, 432 (D.C. 1996), *cert. denied,* 520 U.S. 1155, 117 S. Ct. 1335, 137 L. Ed. 2d 494 (1997) (affirming dismissal of breach of contract and tortious interference with contract claims under Rule 12(b)(6) because the complaint did not indicate that plaintiff had a contract with defendant).

To withstand a motion to dismiss for failure to state a claim, a plaintiff must "'outline or adumbrate' a violation of the statute or constitutional provisions upon which the plaintiff relies, *Sutliff, Inc. v. Donovan Co.,* 727 F.2d 648, 654 (7th Cir. 1984), *and connect the violation to the named defendants; Patton v. Przybylski,* 822 F.2d 697, 701 (7th Cir. 1987)." *Brownlee v. Conine,* 957 F.2d 353, 354 (7th Cir. 1992) (emphasis added). Here, the complaint fails to connect plaintiffs' injuries to any of the named defendants. Even under the liberal "notice pleading" standard embodied in Super. Ct. Civ. R. 8(a)(2) and its federal counterpart, "it is still necessary that a complaint 'contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.'" *Roe v. Aware Woman Ctr. for Choice, Inc.,* 253 F.3d 678, 683 (11th Cir. 2001) (quoting *In re Plywood Antitrust Litigation,* 655 F.2d 627, 641 (5th Cir. Unit A Sept. 8, 1981)). Identifying the party liable for a particular wrong is one of the most fundamental requirements for an adequately pleaded claim. *See Elmore v. Stevens,* 824 A.2d 44 (D.C. 2003). In *Elmore,* this court rejected as inadequate a complaint that never alleged that the defendant did anything connected with plaintiff's claims. *Id.* at 46; *see also McDonald v. Hall,* 610 F.2d 16, 19 (1st Cir. 1979) ("[The court's] duty to be 'less stringent' with pro se complaints does not require us to conjure up unpled allegations." (quoting *Hurney v. Carver,* 602 F.2d 993 (1st Cir. 1979)). Here, plaintiffs' failure to identify in the complaint the manufacturer of the firearm which caused them harm negates any claim under the Strict Liability Act.

The Supreme Court's decision in *Conley v. Gibson,* 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), quoted in the majority opinion at p. 655, does not support the conclusion that the complaint in this case is sufficient to withstand a motion to dismiss for failure to state a claim under our local strict liability statute. *Conley* involved a class action discrimination complaint by railroad employees against their union. The issue was whether more factual details about the alleged discrimination was required to avoid dismissal for failure to state a claim. *Id.* at 47, 78 S. Ct. 99. The complaint alleged, among other things, how petitioners came to be discharged or demoted, and "[d]espite repeated pleas by petitioners, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees"; that the Union failed to represent them in good faith; and, that the union's failure violated their rights under the Railway Labor Act to fair representation from their bargaining agent. *Id.* at 43, 78 S. Ct. 99. The defendant Union was identified clearly and placed on notice of the alleged acts or omissions forming the basis for the plaintiffs' claim of liability. Rejecting the argument that more specific facts were required to support the general allegations of discrimination, the Supreme Court held that the Federal Rules require only "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47, 78 S. Ct. 99 (quoting Fed. R. Civ. P. 8(a)(2)). The pleading standard was met in *Conley;* it is not met here. In *Conley,* the Supreme Court simply held that the complaint adequately set forth a claim under Fed. R. Civ. 8; it did not relieve the plaintiffs of the obligation of identifying the defendant as a wrongdoer and placing it on notice of the claim against it. *See Elmore, supra,* 824 A.2d at 46 (citing *Keranen v. National R.R. Passenger Corp.,* 743 A.2d 703, 713 (D.C. 2000)).

It is fundamental that a plaintiff must disclose sufficient information to put the defendant on notice of the claim against him. *Keranen, supra,* 743 A.2d at 713. The Act in question here imposes strict liability only for death or injuries resulting from the discharge of a particular kind of weapon, and then only when the link has been established between a specific manufacturer and the gun that caused the injury. D.C. Code § 7-2551.02. Plaintiffs have not alleged the requisite connection between the harm they sustained and any of the defendants in this case. Therefore, the complaint is deficient for failure to plead the predicate facts to make out the statutory cause of action. This court should not force a defendant into costly pre-trial discovery when there is no showing that plaintiff can make out a cause of action from the allegations in the complaint. *Sutliff, supra,* 727 F.2d at 654 (citations omitted). For these reasons, I respectfully dissent from Part V.B. of the majority opinion, and I would not reach the constitutional challenges to the Act addressed in Part V.C. However, I join in Parts I through IV.A. of the opinion of the court.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA, Appellant, v. BERETTA, U.S.A., CORP., et al., Appellees.	No. 03-CV-24, 03-CV-38
BRYANT LAWSON, et al., Appellants, v. BERETTA, U.S.A., CORP., et al., Appellees.	

Argued March 2, 2004

Decided April 29, 2005.

James C. McKay, Jr., Senior Assistant Corporation Counsel, with whom Robert J. Spagnoletti, Corporation Counsel, Charles L. Reischel, Deputy Corporation Counsel at

the time the brief was filed, and Edward E. Schwab, Acting Deputy Corporation Counsel at the time of argument, were on the brief, for appellant in No. 03-CV-24.

David S. Molot, Washington, with whom A. Stephen Hut, Jr., John Payton, Eric J. Mogilnicki, R. Kevin Bailey, Karen C. Daly, Roderick V.O. Boggs, Lois G. Williams, and Susan E. Huhta were on the brief, for appellants in No. 03-CV-38.

Thomas E. Fennell and Lawrence S. Greenwald, with whom Michael L. Rice, James A. Wilderotter, Paul R. Reichert, Lawrence P. Fletcher-Hill, Catherine A. Bledsoe, Robert E. Scott, Jr., Lauren Lacey, William M. Griffin, III, Jonann E. Coniglio, Paul F. Strain, M. King Hill, III, James P. Dorr, Sarah L. Olson, John F. Renzulli, Leonard Rosenbaum, Charles L. Coleman, III, Warwick R. Furr, II, Michael C. Hewitt, Michael J. Zomcik, Robert C. Tarics, Michael Branisa, Gerald F. Ivey, Amanda L. Rixse, Timothy A. Bumann, Paul Schleifman, Jeffrey S. Nelson, and Tina Schaefer were on the brief, for appellees.

Dennis A. Henigan and Brian J. Siebel, Washington, filed a brief as amicus curiae on behalf of the Brady Campaign to Prevent Gun Violence.

Roy T. Englert, Jr., Alan E. Untereiner, Jan S. Amundson, and Quentin Riegel filed a brief as amicus curiae on behalf of the National Association of Manufacturers.

James M. Beck, Frank J. Eisenhart, J. Gregory Dyer and Hugh F. Young, Jr., filed a brief as amicus curiae on behalf of the Product Liability Advisory Council, Inc.

Before TERRY and FARRELL, Associate Judges, and PRYOR, Senior Judge.

FARRELL, Associate Judge:

The District of Columbia and nine individual plaintiffs appeal from the dismissal of their suit against manufacturers

or distributors of firearms alleging negligent distribution, public nuisance, and strict liability under D.C. Code § 7-2551.02 (2001). In a comprehensive written opinion, the trial judge entered judgment on the pleadings for the defendants on all counts, ruling in substance that the counts of negligence and public nuisance failed basic tests of duty, foreseeability, and remoteness as pleaded; that the District of Columbia could not bring an action under § 7-2551.02; and that, as to the individual plaintiffs, the statutory tort was insufficiently pleaded and, in any event, is an unconstitutional exercise of extra-territorial regulation by the Council of the District of Columbia.

We reverse the dismissal of the statutory count as to the individual plaintiffs, holding that they may advance to discovery on strict liability notwithstanding the difficulties of proof they may confront. We also reverse the dismissal of that count as to the District of Columbia to the extent--but only the extent--that it seeks subrogated damages as to named individual plaintiffs for whom it has incurred medical expenses. Otherwise we sustain the judgment of the trial court, holding that none of the plaintiffs has stated a valid claim of common-law negligence and the District has not stated a claim of public nuisance on the facts alleged.

I. Background

This is the second time in the District of Columbia that an actionable link has been attempted to be drawn between the manufacture or distribution of firearms and the criminal use of those weapons to kill or injure. *See Delahanty v. Hinckley,* 564 A.2d 758 (D.C. 1989) (on certified question from federal court, finding no basis on facts alleged for holding gun manufacturers and their officers liable under D.C. law for criminal use of gun by John W. Hinckley, Jr.). The plaintiffs in the present case are the District of Columbia government and nine individual persons who themselves were wounded or represent decedents who were shot and

killed by persons unlawfully using firearms in the District of Columbia.[1] The defendants are numerous manufacturers, importers, or distributors of firearms. Underlying all three counts of the complaint are allegations that may be summarized as follows: Although the District of Columbia itself has stringent gun control laws, there nonetheless exists an unchecked illegal flow of firearms into the District to which the defendants by action and inaction have contributed. This flow of guns takes place in numerous ways, including "straw purchases" (purchases from licensed dealers on behalf of other persons not qualified to buy under applicable law), multiple sales (multiple purchases over a short stretch of time by persons intending to sell or transfer to others not qualified to buy), sales by the defendants to "kitchen table" dealers licensed to sell but who do not do so from retail stores, and gun show sales by sellers who typically lack federal firearm licenses and are not required to do purchaser background checks.

The complaint alleges that the defendants have distributed their firearms without adequate self-regulation or supervision in order to increase firearm sales, knowing or constructively knowing that they are creating, maintaining, or supplying the unlawful flow of firearms into the District and similarly knowing that those guns will be used to commit crimes such as the ones that have caused death or injury to the individual plaintiffs or persons they represent. The complaint further alleges numerous illustrative means by which

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[1] To illustrate, the complaint alleges that plaintiff Bryant Lawson was shot by a semi-automatic firearm in early 1997 as he tried to flee from three armed men, all of whom were subsequently convicted of aggravated assault or related crimes arising from the shooting. As a result of the shooting, Lawson is a quadriplegic and suffers other ill effects of his disabling injuries.

the defendants are able to restrict or impede the unlawful flow of firearms into the District but have not done so. These include (to name just three) directing and encouraging their distributors and dealers to refuse to sell in circumstances where the dealer knows or should know that the buyer seeks to make a straw purchase; requiring such dealers to refuse to sell more than one handgun a month to any person not holding a federal firearms license; and requiring their distributors to sell only to "stocking dealers," *i.e.*, retailers who stock guns from retail stores, and not to "kitchen table" dealers or at gun shows.

Based on these general allegations, Count I of the complaint (Strict Liability) alleged that the defendants are liable to the District of Columbia under D.C. Code § 7-2551.02 and related statutes for health care costs, Medicaid expenses, and other costs of assistance and compensation paid by the District to or on behalf of victims of gun violence including civilians, police officers, and firefighters, and are liable to the individual plaintiffs for direct and consequential damages proximately caused by the defendants' conduct. Count II (Negligent Distribution) alleged that the defendants breached "a duty to the District and its residents not to create an unreasonable risk of foreseeable harm from the distribution of their firearms, and to take reasonable steps to limit this risk once it had been created." In Count III (Public Nuisance) the District alone alleged that the defendants have "created an ongoing public nuisance of readily available handguns and machine guns that unreasonably interferes with District residents' enjoyment of health, safety, and peace."

II. Standard of Review

The defendants moved for judgment on the pleadings as to all counts, Super. Ct. Civ. R. 12(c), and the trial judge granted the motion and dismissed each count for failure to state a claim for which relief can be granted. Rule 12(b)(6); *see Osei-Kuffnor v. Argana,* 618 A.2d 712, 713 (D.C. 1993)

(standards same for dismissal under Rule 12(b)(6) and judgment under Rule 12(c)). In reviewing that decision, this court "conducts a *de novo* review of the record, construing all facts and inferences in the light most favorable to the plaintiff[s] and taking the complaint's allegations as true." *Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 210 (D.C. 1997). A complaint may not be dismissed because the court merely "doubts that [the] plaintiff[s] will prevail on a claim," *id.* (citation omitted), but "dismissal for failure to state a claim may properly be granted where it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [the] claim which would entitle [them] to relief." *Id.* (citation and quotation marks omitted).

Applying these standards, we consider first the two common-law counts alleged, then the statutory count as it relates to each of the two classes of plaintiffs.

III. Negligent Distribution

The trial court dismissed the count of negligent distribution primarily on the basis of *Delahanty, supra*. *See* Mem. Op. and Order at 25 ("Based upon the fundamental concept of *stare decisis,* this Court is required to apply *Delahanty.* On the common law negligence claims, this Court is simply not free to do otherwise."). *Delahanty* indeed poses a large obstacle to the plaintiffs' attempt to plead negligence for harm resulting from the unlawful actions of third parties. *Delahanty* came before this court as a certified question from the United States Court of Appeals asking "whether, in the District of Columbia, 'manufacturers and distributors of Saturday Night Specials may be strictly liable for injuries arising from these guns' criminal use.'" *Delahanty,* 564 A.2d at 759 (citation omitted). Our answer to that question ranged more widely, however. We pointed out that, although "[t]he certifying court focused on whether this court would adopt the strict liability theory described in *Kelley* [*v. R.G. Indus.*, 304 Md. 124, 497 A.2d 1143 (Md. 1985)]," that court noted that

"'the theoretical underpinnings [of *Kelley*] are somewhat unclear' and that the certified question was not intended to restrict this court to a particular rationale for this cause of action." *Delahanty,* 564 A.2d at 760 (citation omitted). Further, because this court is "not limited to the designated question of law [in any event] but may 'exercise our prerogative to frame the basic issues as we see fit for an informed decision,'" and because the *Delahanty* appellants were not relying "exclusively on the *Kelley* theory but have continued to advance in this court all the theories in their complaint," we "expand[ed] our inquiry to include the question whether established theories of tort law in the District of Columbia provide a cause of action against gun manufacturers and distributors for injuries arising from the guns' criminal uses." *Id.* (citation omitted).

Just as the federal District Court had dismissed the entire complaint for failure to state a claim, this court "reject[ed] each of the theories appellants have advanced in the federal courts and in this court." *Id.* We rejected first their theory of strict liability for sale of a defective product, based not on a claim of defective design or manufacture--no such claim was advanced--but on the assertion "that the manufacturers had a duty to warn of the dangers of criminal misuse of the gun." There is no duty to warn, we answered, when a potential danger is known and recognized, and "[b]ecause hazards of firearms are obvious, the manufacturer had no duty to warn." *Id.* (citing *inter alia* RESTATEMENT (SECOND) OF TORTS § 402A cmt. j). We paused only slightly longer over the appellants' attempt to apply the theory of "abnormally dangerous activity," *see* RESTATEMENT §§ 519, 520, to the marketing of guns. That cause of action, we explained,

> applies only to activities that are dangerous in themselves and to injuries that result directly from the dangerous activity. The marketing of a handgun is not dangerous in and of itself,

> and when injury occurs, it is not the direct result of the sale itself, but rather ... of actions taken by a third party.

Delahanty, 564 A.2d at 761 (citation and quotation marks omitted). We again emphasized that "any likelihood that ... harm will be great ... would result from the use, not the marketing as such, of handguns." *Id.* And we rejected for similar reasons the "social utility" theory of tort adopted by the Maryland courts in *Kelley, supra*--"requiring proof that the danger of the product outweighs its social utility and that no legislative imprimatur be associated with the product to the contrary," *id.*--pointing out, among other things, that the appellants' attempt to make actionable the manufacture or distribution of "a certain class of inexpensive and allegedly unreliable handguns" (*i.e.,* Saturday Night Specials) ignored the fact that "[a]ll firearms are capable of being used for criminal activity." *Id.* at 761-62 (citation and internal quotation marks omitted).

Finally, we rejected the cause of action for negligent manufacture or distribution, explaining:

> "In general no liability exists in tort for harm resulting from the criminal acts of third parties, although liability for such harm sometimes may be imposed on the basis of some special relationship between the parties." *Hall v. Ford Enters., Ltd.,* 445 A.2d 610, 611 (D.C. 1982); *see also Kline v. 1500 Massachusetts Ave. Apartment Corp.,* 141 U.S. App. D.C. 370, 375-76, 439 F.2d 477, 482-83 (1970) (relationships giving rise to a duty of protection include landlord to tenant, school district to student, employer to employee, and hospital to patient); *District of Columbia v. Doe,* 524 A.2d 30, 32 (D.C. 1987) (school to student). We are not inclined to extend the rationale of

> these decisions to the present case. Appellants have alleged no special relationship with the gun manufacturers and have suggested no reasonable way that gun manufacturers could screen the purchasers of their guns to prevent criminal misuse.

Delahanty, 564 A.2d at 762.

Although our rejection of liability in *Delahanty* rested throughout on the absence of a direct link between the manufacture or distribution of guns and injuries caused by the criminal misuse of those weapons, it is especially the refusal "to extend the rationale of [our] decisions" to the negligence theory alleged there that appears to bar the plaintiffs' claim of negligent distribution here. For this reason, the plaintiffs understandably seek to distinguish *Delahanty* by arguing, for example, that the negligence discussion was *dictum* given the precise phrasing of the D.C. Circuit's question. The fact, however, that we "expand[ed] our inquiry"--as the certifying court foresaw we might--to render "an informed decision" on the reach of "established theories of tort law in the District of Columbia," *Id.* at 760, scarcely makes our analysis of any of those theories advisory. Such reasoning would make an entire subset of answers to certified questions--*i.e.,* those in which we exercise the "latitude" given us to "consider [ ] nondesignated questions and [to] reformulat[e], if necessary, ... [the] questions as certified," *Penn Mut. Life Ins. Co. v. Abramson,* 530 A.2d 1202, 1207 (D.C. 1987)--non-binding *dicta,* contrary to our law that such answers are "*stare decisis* of this court." *Id.* Nor can we fairly truncate *Delahanty*'s holding as saying that a "special relationship with the gun manufacturers"--which is no more alleged here than in *Delahanty*--need be shown only if the plaintiffs allege no "reasonable ways" for manufacturers to effectively screen their purchasers, but not otherwise; that would make four-fifths of the *Delahanty* court's discussion of negligence, and of the limita-

tions it recognized on "liability in tort for harm resulting from the criminal acts of third parties," superfluous.

At bottom, the plaintiffs argue that *Delahanty* was wrongly decided because, contrary to its holding, District of Columbia law requires no "special relationship between the parties" to permit liability in negligence for criminal acts of others provided--to quote the District's brief--"such acts were foreseeable." The individual plaintiffs likewise assert that a legal duty can arise in this context even without a special relationship between the parties--such as landlord and tenant--if the defendant "realized or should have realized the likelihood" that his negligent conduct might "afford[ ] an opportunity to [a] third person to commit [an intentional] tort or crime, ... and that [such] a third person might avail himself of the opportunity." Br. for Indiv. Plaintiffs at 11 (quoting RESTATEMENT (SECOND) OF TORTS § 448 (1965)). We pass over the plaintiffs' implied invitation to overrule *Delahanty* (one not properly addressed to this division), as well as the question, probably unanswerable satisfactorily from our decisions, of whether a special relationship between a plaintiff and a defendant has to undergird any claim of negligence in the District based on harm stemming from the criminal acts of third persons. *But see Workman v. United Methodist Comm.*, 355 U.S. App. D.C. 131, 134, 320 F.3d 259, 263 (2003) (surveying this court's decisions and concluding that under them "the requirement that the defendant has been able to foresee that a third party would likely commit a criminal act ordinarily has, and perhaps must have, a relational component"). We nevertheless conclude that our decisions addressing general tort concepts of duty and foreseeability do not permit recognition of a claim for common-law negligence on the facts alleged here.

Where an injury is caused by the intervening criminal act of a third party,

> this court has repeatedly held that liability depends upon a more heightened showing of foreseeability than would be required if the act were merely negligent. In such a case, the plaintiff bears the burden of establishing that the criminal act *was so foreseeable that a duty arises to guard against it.* Because of the extraordinary nature of criminal conduct, the law requires that the foreseeability of the risk be more precisely shown.

Potts v. District of Columbia, 697 A.2d 1249, 1252 (D.C. 1997) (citations and internal quotation marks omitted; emphasis added). In this context, then, the requisite duty of care required for negligence[2] is a function of foreseeability, arising only when foreseeability is alleged commensurate with "the extraordinary nature of [intervening] criminal conduct." *Id.*[3] And, as we further stated in *Potts,* "[o]ur opinions have

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[2] "[T]o establish negligence a plaintiff must prove a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, and damage to the interests of the plaintiff, proximately caused by the breach." *District of Columbia v. Harris,* 770 A.2d 82, 87 (D.C. 2001) (citations and internal quotation marks omitted).

[3] In *Workman,* the D.C. Circuit noted the theoretically somewhat anomalous blending of duty and foreseeability in this court's decisions ("Ordinarily, the relationship between the parties is the key to determining whether the defendant had a legally enforceable duty to the plaintiff (or her decedent), whereas foreseeability is important to issues of proximate causation and conformity to the standard of care, issues that arise only after a duty has been found."), but that nevertheless "the D.C. courts have repeatedly

[Footnote continued on next page]

made clear *the demanding nature of the requirement of 'precise' proof of a 'heightened showing of foreseeability'* in the context of an intervening criminal act involving the discharge of weapons." *Id.* (citations omitted; emphasis added). The high-water mark, as it were, of a showing of facts sufficient to create a duty to protect against such conduct was in *District of Columbia v. Doe,* 524 A.2d 30 (D.C. 1987), where the claim was that reasonable protective measures by the District of Columbia could have prevented a child from being raped at a District elementary school. Acknowledging the requirement of a heightened showing of foreseeability in that context, *Id.* at 33, we nonetheless identified evidence specific to that school and surrounding area that "could be viewed by reasonable factfinders as enhancing the foreseeability of danger from intruders, thereby creating a duty on the part of District officials to protect the students from this type of criminal activity." *Id.* at 34.[4] In three succeeding cases, by contrast, we rejected liability as a matter of law where foreseeability (hence duty) was not limited by any evidentiary reference to a precise location or class of persons.

In *Clement v. Peoples Drug Store,* 634 A.2d 425 (D.C. 1993), in which an employer was sued for negligence arising

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[Footnote continued from previous page]
spoken of the heightened foreseeability requirement in terms of duty." 355 U.S. App. D.C. at 137, 320 F.3d at 264.

[4] In particular, there was evidence that "crimes against persons [had been committed] in and around the school ... [including] a robbery on the school's playground; sexual assaults and other violent activity [had occurred] in the surrounding area"; and the school security system was defective due to an open rear gate, doors that would not lock, and a malfunctioning intercom, permitting "adult males [to] freely roam [ ] throughout the school." *Doe,* 524 A.2d at 34.

from the shooting death of one of its employees in the store parking lot, "the only evidence presented with respect to [the] shooting's foreseeability was an expert's opinion based on police reports of criminal activity in the surrounding area. No evidence was introduced involv[ing] any gun-related incidents at the particular shopping mall in which the shooting occurred." *Potts,* 697 A.2d at 1252 (summarizing basis for *Clement*'s holding). In *Bailey v. District of Columbia,* 668 A.2d 817 (D.C. 1995), where the plaintiff was shot after attending a cheerleading competition at a junior high school as she was leaving the building, she offered the affidavit of witnesses who asserted that the neighborhood around the school was a "high drug area" and that shootings and other criminal acts had taken place there. Rejecting this showing as insufficient, we explained that "[a]lthough the occurrence of shootings in, and in the vicinity of, the District's public schools is an unhappy reality, ... such 'generic information,' by itself, does not create a duty on the part of the District to protect against the use of firearms under the circumstances presented here." *Id.* at 820.[5] Finally, in *Potts, supra,* the plaintiffs were injured by gunshots from an unknown source as they were leaving the Washington Convention Center (WCC) after attending a boxing event organized by Spencer Promotions, Inc. They sued the organizer and (among others) the District of Columbia for negligence. Relying principally on *Bailey* and *Clement,* we sustained a grant of summary judgment because "plaintiffs [had] proffered no evidence of any prior gun-related violence at any other event held at the WCC or promoted by Spencer Promotions, nor any other specific

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[5] In particular, "there was no evidence of prior gun-related violence or assaults occurring at the school or [even] at any of the many cheerleading competitions that had been held anywhere in the city." *Bailey,* 668 A.2d at 821.

evidence bearing directly on the foreseeability of the shooting incident at issue here." 697 A.2d at 1252.

Potts, Bailey, and *Clement* were decided on summary judgment rather than a motion to dismiss, but they demonstrate the tight boundaries--requiring "'precise' proof of a 'heightened showing of foreseeability,'" *Potts*, 697 A.2d at 1252--within which a claim of common-law negligence must be framed in this jurisdiction "in the context of an intervening criminal act involving the discharge of weapons." *Id.* The plaintiffs in this case broadly allege a duty and foreseeable harm to "the District [of Columbia] and its residents." Complaint, ¶ 151. That duty is unlike even the one claimed to be owed sub-classes of residents (shoppers at a particular store, children at a given school, attendees of a particular event) regarding whom we have repeatedly said that "generic" proffers of foreseeability do not suffice to create a duty of care. The class to whom the defendants allegedly owed a duty here is potentially unlimited except by the population of the District of Columbia, any member of which could be a shooting victim. The class of defendants is likewise potentially open-ended because the identity both of the firearm and of the manufacturer of guns used criminally in the District will often, if not invariably, be a matter of happenstance. This indeterminacy of both the plaintiff and the defendant class, as other courts have recognized, results from the sheer number of ways in which firearms, despite any reasonable precautions manufacturers can be expected to take, may reach the hands of criminal wrongdoers--the sheer number of causal links, in other words, between the licensed manufacture and distribution of firearms and their use to kill or injure others. This court's decisions, we conclude, do not permit recognition of a common-law tort resting on such limitless notions of duty and foreseeability. *See also Lacy v. District of Columbia*, 424 A.2d 317, 321 (D.C. 1980) (citation and internal quotation marks omitted) (recognizing, as a matter of "policy," the existence in our law of "various liabil-

ity-limiting considerations which relieve the defendant of liability for harm he actually caused where the chain of events appears highly extraordinary in retrospect").[6]

Among courts rejecting claims of negligent distribution of firearms similar to the plaintiffs', the New York Court of Appeals in *Hamilton v. Beretta, U.S.A., Corp.*, 96 N.Y.2d 222, 727 N.Y.S.2d 7, 750 N.E.2d 1055 (2001), has provided the most cogent analysis. Like our *Delahanty* decision, *Hamilton* answered certified questions of law from the federal Circuit Court, including whether under New York decisional law, "the defendants owed plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture." *Id.* at 1059. The federal District Court had "imposed a duty on gun manufacturers 'to take reasonable steps available at the point of ... sale to primary distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them.'" *Id.* at 1061 (citation omitted). The New York Court of Appeals rejected that duty as a basis for common-law neg-

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[6] *District of Columbia v. Carlson*, 793 A.2d 1285 (D.C. 2002), does not help the plaintiffs. It concerned the District's duty to maintain in working condition traffic signals installed at intersections with pedestrian crosswalks. The main issue was whether the District could reasonably foresee "that a negligent driver might strike a pedestrian crossing the street" when the traffic light was not working. *Id.* at 1290. Unsurprisingly, the court held that it could, even though the driver technically had "violated a criminal statute" by failing to yield the right of way. *Id.* But we took pains to add that the driver's negligence "was not an intentional act," *Id.* at 1291, reflecting our awareness of how very different "the intervening act of another" was in *Carlson, Id.* at 1290, from the unforeseeable criminal actions of third parties in *Potts, Bailey,* and *Clement.*

ligence. Its prior decisions, like this court's, were "cautious ... in extending liability to defendants for their failure to control the conduct of others," a "judicial resistance to the expansion of duty [growing] out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another." *Id.* at 1061. Under the duty imposed by the District Court, by contrast, "[t]he pool of possible plaintiffs is very large--potentially, any of the thousands of victims of gun violence." *Id.* (footnote omitted). Moreover, the court reasoned,

> the connection between defendants, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief. Such broad liability, potentially encompassing all gunshot crime victims, should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs.

Id. at 1061-62.

The court therefore rejected the plaintiffs' assertion of "a general duty of care aris[ing] out of the gun manufacturers' ability to reduce the risk of illegal gun trafficking through control of the marketing and distribution of their products," pointing out that to "impos[e] such a general duty of care would create not only an indeterminate class of plaintiffs but also an indeterminate class of defendants whose liability

might have little relationship to the [social] benefits of controlling illegal guns." *Id.* at 1063.[7] Although the plaintiffs had "presented [the court] with a novel theory--negligent marketing of a potentially lethal yet legal product, based upon the acts not of one manufacturer, but of an industry--we are unconvinced," the court concluded, that "on the record before us[ ] the duty plaintiffs wish to impose is either reasonable or circumscribed." *Id.* at 1068.

The plaintiffs here point out that *Hamilton* was not decided on a motion to dismiss but only after a trial had shown the absence of proof "that the gun used to harm [the injured plaintiff] came from a source amenable to the exercise of any duty of care that plaintiffs would impose upon defendant manufacturers." *Id.* at 1062. But the plaintiffs in our case do not claim that through discovery they may be able "tangibl[y]" to show "that defendants were a *direct* link in the causal chain that resulted in plaintiffs' injuries," *id.* (emphasis added)--that, in the language of our cases, those injuries were foreseeable to the defendants in the "heightened" sense entailing "'precise proof'" of knowledge and corresponding ability to prevent required by our decisions. *Potts, supra.* At most the plaintiffs allege that the defendants in the aggregate know that a sizeable number of the firearms they manufacture make their way, through practices they reasonably could limit, into the District of Columbia and into the hands of criminals, sometimes with "only a short time passing between the retail sale of a firearm outside the District and its criminal misuse in the District." Complaint, ¶ 123. Even if,

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[7] Another way of viewing it, the court said, was that no evidence had been offered "tending to show to what degree [the plaintiffs'] risk of injury was enhanced by the presence of negligently marketed and distributed guns, as opposed to the risk presented by all guns in society." *Hamilton,* 727 N.Y.S.2d 7, 750 N.E.2d at 1062.

as they claim, discovery may enable them to tie a particular weapon used to kill or injure a named plaintiff or his decedent to a particular manufacturer, they would still not have established a cognizable--*i.e.*, a "reasonable or circumscribed," *Hamilton, supra*--duty to these plaintiffs rather than a duty to the class of all potential victims of gun violence in the District, or indeed anywhere else. They would not, in sum, have stated a claim under our decisions for common-law negligence based on injuries resulting from the criminal acts of third parties.

There is an additional important reason why we decline to recognize the plaintiffs' claim for common-law negligence in the distribution of firearms. The Council of the District of Columbia has intervened precisely in this area by enacting a strict liability statute governing the manufacture and sale of a class of abnormally dangerous firearms, *see* D.C. Code § 7-2551.02; under that statute--as we hold in part V, *infra*--the individual plaintiffs have stated a valid claim (and the District as well may have limited subrogation rights). In analogous circumstances, this court has refused to expand the boundaries of a common-law cause of action in tort. Specifically, in *Carl v. Children's Hosp.*, 702 A.2d 159 (D.C. 1997) (en banc), the full court adopted the tort of wrongful discharge as an exception to the traditional at-will doctrine governing termination of employment, where the discharge violates "a clear mandate of public policy." *Id.* at 164. Although we left future applications of the tort to be decided on a case-by-case basis, we stressed that any such application must be "carefully tethered to fundamental policies" implicit in "statute[s] or municipal regulation[s], or in the Constitution." *Id.* at 164. More important for present purposes, in succeeding cases we declined to apply this cause of action where the policy in question was not implicit--*i.e.*, embodied in some related statute--but rather was "explicit and [might] apply directly" through a statute expressly addressing the matter. *Freas v. Archer Servs., Inc.*, 716 A.2d 998, 1002

(D.C. 1998) (rejecting application of *Carl* as unnecessary where suit was based on statutorily banned and actionable retaliation for exercising rights under the Workers' Compensation Act); *see also McManus v. MCI Communications Corp.*, 748 A.2d 949, 957 (D.C. 2000) (noting and applying the court's previous rejection of "the argument ... that a public policy exception to the at-will doctrine applies to an alleged statutory violation"). The existence of § 7-2551.02 reinforces our unwillingness to relax basic "liability-limiting" standards, *Lacy, supra,* of duty, foreseeability, and causal remoteness to recognize the cause of action for common-law negligence that the plaintiffs advocate.[8]

IV. Public Nuisance

Much of what we have said so far explains why we also reject on the pleadings the claim for public nuisance brought by the District of Columbia alone. The RESTATEMENT (SECOND) OF TORTS § 821B(1)(1979) defines that tort as "an unreasonable interference with a right common to the general public." The District argues that this cause of action "does not derive from its negligence claim but is an independent cause of action with distinct elements" (Reply Br. for District at 7), namely, (1) an interference with a public

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[8] *See also Williams v. Baker,* 572 A.2d 1062, 1072 (D.C. 1990) (en banc), where in adopting the zone of danger test limiting the class of persons who may claim negligent infliction of emotional distress, the court explained:

> [T]his jurisdiction should not cast itself adrift on a sea of infinite foreseeability, subject only to such arbitrary limitation as we should impose.... [T]he issue of whether a plaintiff can recover damages for fear of harm to a third person is a question of policy for the court, not one to be determined on a case-by-case determination of whether the injury was foreseeable.

right (2) that is unreasonable. Although this court referred to that definition of the tort in *B & W Mgmt., Inc. v. Tasea Inv. Co.*, 451 A.2d 879 (D.C. 1982), the defendants and their amici argue that we have never recognized a public nuisance claim that did not involve either ownership (and control of) real property, criminal violations, or independently tortious conduct such as negligence--none of which are alleged, or sufficiently alleged, in this case.

As an independent tort, claims of nuisance have indeed not been treated favorably by this court's decisions. In recent cases we have even said that "nuisance is a type of damage and not a theory of recovery in and of itself," *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 934 (D.C. 1995), so that recovery in such cases, "if at all, [must be] on the theory of negligence," *Bernstein v. Fernandez*, 649 A.2d 1064, 1072 (D.C. 1991) (citation and quotation marks omitted), or another theory such as intentional infliction of emotional distress. *Jonathan Woodner Co., supra.* The District argues that these statements were made in the context of claims for private, not public, nuisance but our decision in *Bernstein* noted that, "for the purpose of our holding in this case," the point did not depend on "whether the alleged nuisance is public or private." *Bernstein*, 649 A.2d at 1073 n. 8. Even the RESTATEMENT definition explains "nuisance" by "reference to two particular kinds of harm--the invasion of two kinds of interests[, public and private]--by conduct that is tortious *only if it falls into the usual categories of tort liability.*" RESTATEMENT (SECOND) OF TORTS § 821A cmt. c (1979) (emphasis added).

The defendants here do not dispute, however, that a separate tort of public nuisance is cognizable in the District of Columbia, or that the RESTATEMENT provides the appropriate definition: "an unreasonable interference with a right common to the public." The question before us, instead, is whether the District has sufficiently pleaded that

cause of action, and the answer to that question depends critically on how prepared we are to loosen the tort from the traditional moorings of duty, foreseeability, and causal remoteness that have made us reject the plaintiffs' claim of negligence. For the following reasons, we are not convinced that the public nuisance cause of action the District alleges is sufficiently distinguishable from its negligence claim to justify a different result.

The issue was defined pointedly by the majority and dissenting opinions in *People v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 761 N.Y.S.2d 192 (2003), where the state's suit for public nuisance essentially mirrored the District's allegations in this case:

> Plaintiff's complaint ... claims that illegally possessed handguns are a common-law public nuisance because they endanger the health and safety of a significant portion of the population; interfere with, offend, injure and otherwise cause damage to the public in the exercise of rights common to all; and that, after being placed on actual and constructive notice that guns defendants sell, distribute and market are being used in crimes, they have, by their conduct and omissions, created, maintained and contributed to this public nuisance, because they manufacture, distribute and market handguns allegedly in a manner that knowingly places a disproportionate number of handguns in the possession of people who use them unlawfully. Plaintiff further claims that defendants are on notice that certain types of guns, and guns sold in certain locales, are disproportionately used in the commission of crimes.

Id. at 194. The dissent in *Sturm, Ruger* took the position that "[a] negligence analysis, with its requirement of the existence of a duty limited by concomitant considerations of proximate cause, foreseeability, fault, intent, and tempered by notions of the equitable apportionment of economic liability, is inapposite to an action for abatement of a public nuisance brought by the state in the proper exercise of its police powers." *Id.* at 208 (Rosenberger, J., dissenting).

The majority rejected that proposition, in large part "based on the reasoning and implications of *Hamilton v. Beretta, [U.S.A., Corp., supra]*." *Id.* at 194. It determined that "much of the Court[of Appeals'] reasoning in dismissing the *Hamilton* negligent marketing complaint logically, and most aptly, applies to our consideration of this plaintiff's common-law public nuisance claim." *Id.* at 196. In particular, the *Hamilton* court's concern about "potentially limitless liability and about the unfairness of imposing liability for the acts of another" was "common to both negligent marketing and public nuisance claims," because to disregard "the existence, remoteness, nature and extent of any intervening causes between defendants' lawful commercial conduct and the alleged harm" would invite "a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities." *Id.* at 196-97. Whereas New York decisions validating public nuisance claims had "involve[d] specific harm directly attributable to defendant or defendant's activity," *Id.* at 198 n. 2, the present complaint would "impose[ ] an undefined duty of care on handgun manufacturers and distributors," *Id.* at 200, despite the "intervention of unlawful and frequently violent acts of criminals--over whom defendants have absolutely no control--who actually, directly, and most often intentionally, cause the cited harm." *Id.* at 199. The court concluded that the legislative and executive branches were "vastly better suited to address" the "societal problems associated with, or

following, legal handgun manufacturing and marketing," "problems which may be as remote from a defendant's conduct and control as these." *Id.* at 203.

We agree with this reasoning, and are similarly unwilling to recognize a claim of common-law public nuisance that disregards, or greatly dilutes, the liability-limiting factors applied in part III, *supra*. The sheer number of causal links, and resulting attenuation, that underlie the District's claim of injury from the defendants' invasion of a public right were described by the Supreme Court of Connecticut in a similar suit brought by the city of Bridgeport:

> The manufacturers sell the handguns to distributors or wholesalers and ... those sales are lawful because federal law requires that they be by licensed sellers to licensed buyers. The distributors then sell the handguns to the retailers, sales that, again, are required by federal law to be by licensed sellers to licensed buyers. The next set of links is that the retailer then sells the guns either to authorized buyers, namely, legitimate consumers, or, through the "straw man" method or other illegitimate means, to unauthorized buyers, sales that likely would be criminal under federal law. Next, the illegally acquired guns enter an "illegal market." From that market, those guns end up in the hands of unauthorized users. Next, either the authorized buyers misuse the guns by not taking proper storage precautions or other unwarned or uninstructed precautions, or the unauthorized buyers misuse the guns to commit crimes or other harmful acts. Depending on the nature of the conduct of the users of the guns, the plaintiffs then incur expenses for such municipal necessities as

> investigation of crime, emergency and medical services for the injured, or similar expenses. Finally, as a result of this chain of events, the plaintiffs ultimately suffer ... increased costs for various municipal services, ... injuries and deaths of Bridgeport's residents, ... and a negative impact on the ... ability of the residents to live free from apprehension of danger.

Ganim v. Smith & Wesson Corp., 258 Conn. 313, 780 A.2d 98, 123-24 (2001).[9] The court rejected a claim of public nuisance brought by "a plaintiff situated as remotely from the defendants' conduct as these plaintiffs are, or who present[ ] a chain of causation as lengthy and multifaceted as these plaintiffs have." *Id.* at 133.

Other courts likewise have rejected public nuisance as a basis for holding gun manufacturers and distributors liable, for reasons of attenuation, remoteness, or inability to control the nuisance. *See generally Tioga Pub. School Dist. # 15 v. United States Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) ("[L]iability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality al-

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[9] Like the Connecticut complaint, the District's public nuisance claim alleges that the "[d]efendants' ongoing conduct has created an ongoing public nuisance of readily available handguns and machines guns ... that unreasonably interferes with District residents' enjoyment of health, safety, and peace .... As a result of the continued possession and use of these firearms, residents of the District will be killed and injured, and the public will continue to fear for its health, safety, and welfare and will be subjected to conduct that creates a reasonable apprehension of danger to person and property." Complaint, ¶ 164.

leged to constitute a nuisance, since without control a defendant cannot abate the nuisance."). The court in *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A., Corp.*, 273 F.3d 536 (3d Cir. 2001), for example, recited "a chain of seven links" necessary to "connect the manufacture of handguns with municipal crime-fighting costs," and held that

> [t]his causal chain is simply too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim. In the initial steps, the manufacturers produce lawful handguns and make lawful sales to federally licensed gun distributors, who in turn lawfully sell those handguns to federally licensed dealers. Further down the chain, independent third parties, over whom the manufacturers have no control, divert handguns to unauthorized owners and criminal use.

Id. at 541. The same court in *City of Philadelphia v. Beretta, U.S.A., Corp.*, 277 F.3d 415 (3d Cir. 2002), rejected the city's attempt "to shorten the causal chain by arguing that the 'thriving illegal market ... injures [it], even before any guns acquired in the illegal market are actually used in the commission of a crime.'" *Id.* at 424. This assertion, the court explained, "does not reduce the links that separate a manufacturer's sale of a gun to a licensee and the gun's arrival in the illegal market through a distribution scheme that is ... lawful" and a succession of unlawful third-party acts (such as straw purchases) "likely [to be] ... long[ ] and ... varied." *Id.* (footnote omitted). *See also Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040, 1061 (C.D. Cal. 2002) ("Plaintiffs have failed to allege facts that would support a finding that [defendant] had control over the nuisance at the time Plaintiffs were injured.").

The District argues that analogizing to negligence principles of foreseeability, intervening causation, remoteness

and the like is improper here because the complaint alleges *intentional* tortious conduct by the manufacturers and distributors. *See* Reply Br. for District at 7 (quoting RESTATEMENT § 821B cmt. e) (emphasis added) ("[T]he defendant is held liable for a public nuisance if his interference with the public right was *intentional* or was unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct"). But in order to plead intentional wrongdoing sufficient to support a nuisance claim, the District had to plead facts supporting the conclusion that each defendant either intended the consequences of its commercial acts or was substantially certain that those consequences would occur. *See Wager v. Pro,* 195 U.S. App. D.C. 423, 428-29, 603 F.2d 1005, 1010-11 (1979); *see also Kawaauhau v. Geiger,* 523 U.S. 57, 61-62, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) ("Intentional torts generally require that the actor intend 'the consequences of an act,' not simply 'the act itself.'") (citing RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (1964)). Although the consequence the complaint defines as a public nuisance is "the ready *availability* of handguns, 'machine guns,' and other unlawfully possessed firearms," Complaint, ¶ 162 (emphasis added), "the gravamen of the complaint is that guns are used in crime, with resulting deaths and injuries to [District] residents, prompting much of the expenses [the District] claims as damages." *City of Philadelphia,* 277 F.3d at 424 n. 13; *see, e.g.,* Complaint, ¶ 4 ("Plaintiffs have suffered and continue to suffer harm ... [as a result of] shootings and criminal conduct in the District that have been, and continue to be, caused by the Defendants' conduct"). Nothing in the complaint suggests that any of these manufacturers intended or knew with substantial certainty that any specific shooting-related injuries or deaths would occur within the District (or elsewhere) as a result of their sale of particular firearms to distributors and dealers outside the District. Rather, what the complaint alleges is that the defendants in the *aggregate*

know that some *indeterminate* number of the firearms they produce will make their way into the hands of criminal users in the District of Columbia. To accept such general and remote knowledge of consequences as sufficient to plead public nuisance would erase any similarity between that right of action and "the usual categories of tort liability," RESTATEMENT (SECOND) OF TORTS § 821A cmt. c (1979), something our decisions do not permit. *See, e.g., Jonathan Woodner Co., supra; Bernstein, supra; District of Columbia v. Fowler,* 497 A.2d 456, 461 n. 8 (D.C. 1985) ("No matter what the precise underlying legal theory may be, ... some 'tortious conduct' such as negligence is a necessary component of virtually all nuisance claims.").

In the end, the District's nuisance theory amounts to a claim that the licensed manufacture and sale of firearms *by itself,* because of the foreseeable effects it produces, constitutes a public nuisance. As will be seen, that is an apt summary description of the legislative findings the Council of the District of Columbia made in adopting a strict liability statute for the manufacture and distribution of a class of abnormally dangerous firearms. But as a theory of common-law liability, it is only nominally distinguishable from the endeavor in *Delahanty, supra,* to extend the RESTATEMENT doctrine of "abnormally dangerous activity" to the manufacture and sale of particular handguns, a claim we rejected because of the remoteness of the link between the activity—"not dangerous in and of itself"--and the harm that results from the criminal misuse of guns. *Delahanty,* 564 A.2d at 761 (citation and internal quotation marks omitted). Moreover, what we stated at the end of our discussion of negligence, part III, *supra,* applies with equal importance here: The legislature by enacting D.C. Code § 7-2551.02 has relaxed the liability-limiting elements of traditional tort law in creating a cause of action against gun manufacturers and distributors for injuries caused by particular firearms. For these reasons, we are not persuaded of either the necessity or the wisdom of adopting ju-

dicially a right of action for public nuisance applied to the manufacture and sale of guns, where the effect would be to supplant common-law limitations of duty, foreseeability, and direct causation with the latitudinarian standards of "an unreasonable interference with a [public] right," *see generally N.A.A.C.P. v. AcuSport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003)[10]--a tort that, as pleaded here, could generate suits "not merely against these defendants[ ] but ... against ... other types of commercial enterprises, in order to address a myriad of societal problems ... regardless of the distance between the 'causes' of the 'problems' and their alleged consequences." *Sturm, Ruger,* 761 N.Y.S.2d at 203.

V. Strict Liability

In Count I, the plaintiffs all have brought suit under D.C. Code § 7-2551.01 *et seq.* (2001), the Assault Weapon Manufacturing Strict Liability Act of 1990 (the "SLA" or "Act"). The operative provision of the statute, § 7-2551.02, states:

> Any manufacturer, importer, or dealer of an assault weapon or machine gun shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault

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10 *See, e.g., N.A.A.C.P.*, 271 F. Supp. 2d at 496 ("The rule employed with respect to limitations on liability, whatever label is used, in public nuisance actions must be less restrictive than in individual tort actions"); *id.* at 493 ("intervening actions, even multiple or criminal intervening actions, need not break the chain of causation"); *id.* ("[w]here multiple actors contribute to a public nuisance, equity can reach actors whose conduct standing alone might not be actionable.").

> weapon or machine gun in the District of Columbia.

The SLA defines "assault weapon" to include a number of specific products, and invests "machine gun" with the same meaning defined in D.C. Code § 7-2501.01(10), *i.e.*, "any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot: (A) Automatically, more than 1 shot by a single function of the trigger; [or] (B) Semiautomatically, more than 12 shots without manual reloading." In enacting the SLA, the D.C. Council understood assault weapons to "include both automatic and semiautomatic weapons," as well as "some handguns and rifles," a class of weapons that it found have pernicious consequences for the health and safety of District residents and visitors to the District. SLA § 2(2), D.C. Law 8-263 [Act 8- 289], § 2, 37 DCR 8482 (Dec. 28, 1990) (hereafter "Findings").

The trial court dismissed this count as to all defendants, concluding that (1) the statute provides no cause of action to the District of Columbia and (2), in any case, (a) the plaintiffs failed to state a claim within the Act and (b) the SLA is an unconstitutional attempt at extraterritorial regulation, violating both the Commerce Clause and principles of due process. We therefore confront three issues:

> A. Does the SLA, or any other statute by implication, give the District of Columbia a right of recovery for liability under the SLA;
>
> B. Did the complaint sufficiently plead the defendants' liability to the plaintiffs under the SLA; and, if so,
>
> C. Does the SLA impermissibly burden interstate commerce or violate due process?

We answer these questions in order.

A. District of Columbia

"The text of an enactment is the primary source for determining its drafters' intent." *Stevenson v. District of Columbia Bd. of Elections & Ethics,* 683 A.2d 1371, 1376 (D.C. 1996) (citation and quotation marks omitted). "In the ordinary case, absent any indication that doing so would frustrate [the legislature's] clear intention or yield patent absurdity, our obligation is to apply the statute as [the legislature] wrote it." *Hubbard v. United States,* 514 U.S. 695, 703, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995) (citation and internal quotation marks omitted); *see also Peoples Drug Stores, Inc. v. District of Columbia,* 470 A.2d 751, 753-54 (D.C. 1983). At the same time, we do not read statutory words in isolation; the language of surrounding and related paragraphs may be instrumental to understanding them. *See Carey v. Crane Serv. Co.,* 457 A.2d 1102, 1108 (D.C. 1983). "Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, language ..., structure, and subject matter." *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am.,* 508 U.S. 439, 455, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993) (citation and internal quotation marks omitted).

Applying these standards, we hold that the SLA confers a right of action on individuals who are injured, but not the District of Columbia. The statute makes manufacturers and others strictly liable in tort "for all direct and consequential damages that arise from *bodily injury or death* if the bodily injury or death proximately results from the discharge of" one of the enumerated firearms. Section 7-2551.02 (emphasis added). Bodily injury or death self-evidently can happen only to individual persons, not corporate entities. Surrounding provisions of the statute confirm the purpose to give redress to individuals. The statute does "not operate to limit in scope any cause of action, other than that provided by this [subchapter], available to a *person* injured by an assault

weapon." Section 7-2551.03(c) (emphasis added). And, it affords no right of action to "a *person* injured by an assault weapon while committing a crime," or to one seeking recovery "for a *self*-inflicted injury" resulting from "a reckless, wanton, or willful discharge of an assault weapon." Section 7-2551.03(b) & (e) (emphases added). The subject of these provisions, then, is a right of action--granted, preserved, or withheld--of individuals, not government, to sue for damages arising from bodily injury or death traceable to assault weapons.[11]

The District distinguishes between the verb the legislature used--"arise from"--and others it might have used if it meant to restrict the class of those entitled to recover damages to individuals. "Individuals' injuries," the District reasons, "are the source of the District's damages under the SLA, including the costs of law enforcement and healthcare services that 'arise from' the 'bodily injury or death' of individuals." Br. for District at 38; *see also* Reply Br. for District at 23 (claiming a right under the SLA "to recover the expenses that it [has] incurred for law enforcement, healthcare services, paid leave of employees, and other services" attributed to gun violence). But one need only consider the magnitude--the unboundedness--of such "damages" to realize the implausibility of the argument that the Council provided

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[11] The legislative findings accompanying the Act reinforce this point, stating (among other things) that the manufacture and distribution of assault weapons "expos[es] the citizens [of] and visitors to the District [of Columbia] to a high degree of risk of serious harm," and "[a]s between the manufacturer or dealer of an assault weapon on the one hand and *the innocent victim* of the discharge of an assault weapon on the other hand, the manufacturer or dealer is more at fault than the victim." Findings (14) & (15), 37 DCR at 8483 (emphasis added).

for them in the SLA by its choice of a verb and nothing else. "Arise from" may well connote a causal relation less direct and immediate than, say, "result from," but to freight it with a legislative intent to include the vast array of law enforcement costs and governmental health-care services attributable to assault weapon injuries as recoverable under the statute demands far more than the verb alone can bear. Neither it nor the addition of "consequential" to the "direct" damages recoverable expands, in our judgment, the class of those given a cause of action by the SLA.

The District asserts, however, an additional and more limited claim for damages that we conclude has partial--but only partial--validity. The complaint alleges that in addition to the right of action the SLA gives the District (a claim we have rejected), the District may recover under two other statutes the medical and related expenses it has incurred as a result of third-party wrongful conduct. Specifically, D.C. Code § 4-601 *et seq.* (2001), the Health-Care Assistance Reimbursement Act of 1984 (HCARA), grants the District "an independent, direct cause of action against [a] third party for the unreimbursed value or cost of ... health-care assistance," whenever the District has "provide[d] health-care assistance to a beneficiary who has suffered an injury or illness under circumstances creating liability in [that] third party." *Id.* § 4-602(a). "Beneficiary" means "any individual who has received health-care assistance from the District and, if applicable, that individual's guardian, conservator, personal representative, estate, dependants, and survivors." *Id.* § 4-601(1). Another statute, D.C. Code § 5-601 *et seq.* (2001), the Medical Care Recovery Act of 1978 (MCRA), similarly gives the District a "right to recover" health-care and funeral expenses it has paid for police officers and firefighters, and the costs of their extended absence with pay, from third-parties whose tortious conduct resulted in injuries to those employees. *Id.* § 5-602.

Both statutes effectively give the District rights of "legal subrogation," D.C. Code § 4-602(b), to any right or claim a beneficiary or specified District employee has against a third-party tortfeasor. Relying on these provisions, the complaint alleges that as a proximate result of the defendants' conduct, the District "has incurred and will incur costs that are recoverable under [the HCARA and the MCRA] including: (1) health care costs and Medicaid expenses in treating victims of gun violence ...; (2) costs of care and treatment provided to officers and members of the Metropolitan Police Department and the Fire Department of the District of Columbia ...; and (3) leave of absence wages and other assistance and compensation paid or to be paid police officers and firefighters ... on account of their having suffered gun injuries." Complaint, ¶ 137. Framed this broadly, these allegations do not add anything to the District's claim of a right to recover under the SLA, which we have rejected. Both the HCARA and the MCRA allow the District to recover specific unreimbursed costs for care and assistance to *individual* victims of tortious third-party conduct. Neither statute provides for recovery of undifferentiated--indeed, unlimited--costs "the District has incurred and will incur" for the care and treatment of an indeterminate class of "victims of gun violence," including civilians, police, and firefighters not otherwise identified by the complaint. It is doubtless true that the District "is incurring, and will continue to incur great expense for the services of hospitals, physicians, nurses," etc. to "care [for] and treat [assault weapon] victims' injuries," Complaint, ¶ 135, but neither the HCARA nor the MCRA gives the District a right to aggregate these expenses in a single action combining innumerable claims for subrogation, each involving factually and legally distinct issues and all subject to different defenses--in short, a "kind of subrogation-in-gross." *Massachusetts Laborers' Health & Welfare Fund v. Philip Morris, Inc.*, 62 F. Supp. 2d 236, 246 (D. Mass. 1999).

On a far more specific level, however, the District has stated a claim under the HCARA that should not have been dismissed, provided that--as we hold in part V. B., *infra*--the individual plaintiffs have stated a claim under the SLA. As to one plaintiff, Bryant Lawson, the complaint alleges that as a result of injuries he suffered from bullets "most likely ... fired by a 'machine gun' ... manufactured, imported, or sold by one of the [d]efendants," Complaint, ¶ 56, he "relied on Medicaid to pay for the surgery, hospitalization, medications, and rehabilitation he needed because of his gunshot wounds" and he "continues to rely on Medicaid to treat the frequent problems that result from his being a quadriplegic." Complaint, ¶ 58. Regarding a second plaintiff, Gregory Ferguson, the complaint alleges that as a proximate cause of having been struck by bullets from an AK-47-type weapon, he "spent several days in D.C. General Hospital and over a year in physical therapy." As these allegations exemplify, to the extent the complaint cites specific nonreimbursed medical expenses incurred by the District for the treatment of individual named plaintiffs, the HCARA authorized the District to "[i]ntervene ... in [this] proceeding brought by the beneficiary," D.C. Code § 4-604(a)(2), to attempt to recover those expenses. The District should be treated as having done so, and may remain in the case for that purpose.

B. Rule 12(b)(6)

By its terms, § 7-2551.02 requires proof tying an assault weapon or machine gun that causes death or bodily injury to a particular manufacturer, importer, or dealer ("Any manufacturer, [etc.] of *an* assault weapon ... shall be held strictly liable ... if the bodily injury ... proximately results from the discharge of *the* assault weapon" (emphasis added)). The trial court dismissed the individual plaintiffs' claims under the statute because none of the plaintiffs could identify in the complaint "which defendant and corresponding [machine gun or assault weapon] was involved in their respective injury or

death of the relevant decedent." The court acknowledged that "[t]he involvement of a recovered weapon might potentially moot many of the legal deficiencies associated with the plaintiffs' reliance on the [SLA]," but concluded that since "*none* of the individual plaintiffs bases his or her case on weapons that were actually recovered, their claims are pled on pure speculation" (emphasis in original). In our view, requiring the plaintiffs to identify with particularity the weapons that caused their injuries and the manufacturers of those weapons at this early stage of the proceedings is contrary to the usual rules of pleading, and does not justify dismissal under Rule 12(b)(6).

In substance, each individual plaintiff alleged that the injuries of which he or she complains were caused by an assault weapon or a machine gun as defined by the SLA.[12] "Under conventional liberal rules of 'notice' pleading," *West v. Morris,* 711 A.2d 1269, 1271 (D.C. 1998); *see* Super. Ct. Civ. R. 8(a), those allegations were sufficient to state a claim because dismissal under Rule 12 is proper only if it is apparent "beyond doubt the plaintiff[s] can prove no set of facts in support of [their] claim[s] which would entitle [them] to re-

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[12] For example, the complaint alleged that Andre Wallace, the son of plaintiff Laura Wallace, and Natasha Marsh, the daughter of plaintiff Madilia Marsh-Williams, were shot and killed by three men, at least one of whom was armed with a 9mm pistol. Complaint, ¶ 82. Nine-millimeter bullets were recovered from the bodies of both victims. Complaint, ¶ 87. "On information and belief, the bullets that killed Wallace and Marsh were fired by a 'machine gun' or 'assault weapon' as those terms are defined by the Strict Liability Act." *Id.* Only the plaintiff Lawson qualified his allegation by stating that he was "most likely" shot by a weapon covered by the Act, but that does not affect the sufficiency of the allegation.

lief." *Owens v. Tiber Island Condo. Ass'n,* 373 A.2d 890, 893 (D.C. 1977); *see Vincent v. Anderson,* 621 A.2d 367, 372 (D.C. 1993) (issue of "whether or not appellant[s] had available evidence sufficient to prove the allegations in [their] complaint," "really had nothing to do with the legal sufficiency of the complaint"). The trial court found "no excuse for [each plaintiff's] inability to assert which defendant's weapon was used to harm him, if this fact is knowable at all," but that criticism is premature, as is the court's comment that the defendant manufacturers and distributors "surely have no access to the weapons that were physically associated" with the individual plaintiffs' claims. The plaintiffs point to several avenues for linking a firearm to a particular manufacturer that may be open to them in discovery, and even if all seem "speculative" to us as a way of arriving at that link, none may be rejected at this stage. *See, by contrast, Bly v. Tri-Cont'l Indus., Inc.,* 663 A.2d 1232, 1236 (D.C. 1995) (summary judgment properly granted manufacturers *after discovery* for "lack of evidence as to which of [defendant's] products" caused plaintiffs' injuries).

C. Constitutional Challenges

The defendants argue that the SLA violates both the Commerce Clause and due process principles applicable to the District through the Fifth Amendment. In essence the argument is that, "[b]y imposing strict liability on firearms manufacturers for conduct which is wholly lawful where it takes place--that is, the lawful manufacture, production and distribution of firearms outside of the jurisdiction of the statute--the [SLA] ... impermissibly burden[s] the lawful interstate commerce of firearms" and "arbitrarily attempt[s] to impose [a] regulatory scheme ... beyond the boundaries of the state which enacts [it]." Br. for Appellees at 69, 73. We consider first the Commerce Clause argument, then the claim of violation of due process. Neither argument persuades us.

1. Commerce Clause

"Though phrased as a grant of regulatory power to Congress, the [Commerce] Clause has long been understood to have a 'negative' [or dormant] aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys. v. Department of Envtl. Quality,* 511 U.S. 93, 98, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994); *see District of Columbia v. Eastern Trans-Waste of Md., Inc.,* 758 A.2d 1, 16 (D.C. 2000). Of course, "[l]egislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *Head v. New Mexico Bd. of Exam'rs in Optometry,* 374 U.S. 424, 428, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963) (citations and internal quotation marks omitted). In particular, "the Constitution when conferring upon Congress the regulation of commerce, ... never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Id.* (internal quotation marks omitted). Under the "two-tiered approach" adopted by the Supreme Court,

> [w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the [s]tate's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986) (citations omitted).

The vice against which the first, or anti-discrimination, component of this test operates is "local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 390, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994). No serious argument is made that the SLA exhibits economic protectionism. Because there *are* no legal manufacturers, distributors, or sellers of assault weapons and machine guns in the District of Columbia,[13] the SLA does not discriminate in favor of in-state business or economic interests against their out-of-state counterparts. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978) ("[S]ince there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless."). And, contrary to what the defendants do argue, the SLA does not "directly regulate[ ] ... interstate commerce." *Brown-Forman Distillers Corp.*, 476 U.S. at 579, 106 S. Ct. 2080. It does not regulate in any direct sense, but instead simply imposes liability for harm caused by an especially dangerous subset of firearms; and it limits that right of action to injuries incurred in the District of Columbia. It may have *effects* outside of the District if manufacturers alter their business practices to avoid that liability, but "[l]egislation ... may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *Head*, 374 U.S. at

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[13] The manufacture and distribution of machine guns is prohibited in the District, D.C. Code § 7-2504.01 (2001), as is their possession. *Id.* §§ 7-2502.01 & -2502.02(a)(2).

428, 83 S. Ct. 1759 (citation and internal quotation marks omitted). *See Sherlock v. Alling,* 93 U.S. 99, 103, 23 L. Ed. 819 (1876) (state statute "declar[ing] a general principle respecting the liability of all persons within the jurisdiction of the State for torts resultin[g] in the death of parties injured" does not offend the dormant Commerce Clause); *Stone v. Frontier Airlines, Inc.,* 256 F. Supp. 2d 28, 46 (D. Mass. 2002) (rejecting argument that "the dormant Commerce Clause precludes state tort law from regulating any activity that, while having local effects, also effectuates some external consequences").

The validity of the SLA against Commerce Clause challenge thus depends on whether it "imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'" *C & A Carbone, Inc.,* 511 U.S. at 390, 114 S. Ct. 1677 (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)). State regulation on subjects "relating to the health, life, and safety of ... citizens," *Head,* 374 U.S. at 428, 83 S. Ct. 1759, receives special deference in that analysis. *See Smith v. District of Columbia,* 436 A.2d 53, 58 (D.C. 1981); *Electrolert Corp. v. Barry,* 237 U.S. App. D.C. 328, 331, 737 F.2d 110, 113 (1984). The "benefits" of the SLA to the District of Columbia are reflected in the legislative findings that accompanied its passage. The D.C. Council found (a) that "the increase in homicides in the District has been accompanied by a proliferation of use of assault weapons (*i.e.,* automatic and semi-automatic guns) in the community," with "[s]emi-automatic handguns represent[ing] a growing percentage of the handguns recovered by the [police and] ... involved in handgun crime"; (b) that "[a]ssault weapons, and the manufacture and distribution of assault weapons are abnormally and unreasonably dangerous, and pose risks to the citizens of and visitors to the District which far outweigh any benefits that assault weapons may bring"; (c) that "[i]t is foreseeable by manufacturers and distributors of assault weapons that the

criminal or accidental use of assault weapons will cause injury and death"; and (d) that the manufacture and distribution of these weapons "are among the proximate causes of the rising number of homicides in the District, exposing the citizens [of] and visitors to the District to a high degree of risk of serious harm." Findings (9), (10), (12), (13), & (14), 37 DCR 8483. The legislation, in short, addresses a pressing concern for public safety by giving innocent victims of gun violence in the District a cause of action against manufacturers or dealers for injuries caused by particularly lethal firearms whose destructiveness outweighs any legitimate utility they may have.

In contrast to this strong governmental interest, any effect the SLA would have on interstate commerce is "incidental ... [and not] clearly excessive in relation to the ... local benefits." *Pike,* 397 U.S. at 142, 90 S. Ct. 844. Only firearms the Council has classified as "abnormally and unreasonably dangerous" are covered by the Act, and liability attaches only for death or injuries resulting from the discharge of one of these weapons in the District of Columbia--and then only when the link has been established between a specific manufacturer and the gun that caused the injury. Moreover, assault weapons "originally distributed to a law enforcement agency or ... officer" are excluded from the statute's reach, § 7-2551.03(a), as are firearms used by persons injured while committing crimes or who injured themselves. Section 7-2551.03(b), (e). Given these limitations, the defendants are hard put to explain how the SLA burdens interstate commerce any more than does the District's longstanding comprehensive statutory ban on the possession, sale, or transfer of virtually all firearms, which we upheld against Commerce Clause attack in *McIntosh v. Washington,* 395 A.2d 744, 756-57 (D.C. 1978). *See also Smith,* 436 A.2d at 59-60 ("The District ... also bars unlicensed pistols, ... machine guns, [and] sawed-off shotguns"; "[i]t is well within the police power of the District ... to declare as contraband

such inherently dangerous articles without offending the commerce clause").

Indeed, it is not apparent why the SLA's effect on interstate commerce is greater than that of numerous other state laws imposing liability in tort on manufacturers of defective or abnormally dangerous products. *See, e.g., Tigue v. E.R. Squibb & Sons, Inc.*, 136 Misc.2d 467, 518 N.Y.S.2d 891, 897 (N.Y. Sup. Ct. 1987), *aff'd*, 139 A.D.2d 431, 526 N.Y.S.2d 825 (1988), *aff'd sub nom. Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069 (1989) (holding that relaxation of the traditional product identification requirement in tort law to provide a forum to innocent victims of the drug DES was not a "clearly excessive" burden "in relation to the putative local benefits" and, hence, was not violative of the Commerce Clause). The defendants profess alarm that the SLA, if upheld, will "require [them] to alter their legal business practices on a national and international level." Br. for Appellees at 71. But given the limitations on the reach of the Act we have described, that fear seems fanciful, especially since it stems mainly from concern with the broader remedies the plaintiffs have sought--*i.e.*, injunctive and "abatement" relief--for the alleged negligence and public nuisance,[14] claims we have rejected here. In any event, the fact that exposure to "product liability in tort, whether strict or otherwise," may also

> affect commercial decisions by actors in other states, such as ... manufacturers, does not implicate the Commerce Clause. Differences in

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[14] *See* Br. for Appellees at 71 ("By the injunctive relief or 'abatement' they request, plaintiffs ultimately seek broad reforms in defendants' national and international business practices according to plaintiffs' own policy preferences.").

> the conditions and risks of doing business from state to state are in part the inevitable result of *any* state economic regulation, but the effects that these differences have on commercial decisions, even those that involve interstate trade, are not by themselves nearly so direct as to 'affect commerce' in the constitutional sense.

Bowman v. Niagara Mach. & Tool Works, Inc., 832 F.2d 1052, 1056 (7th Cir. 1987) (emphasis in original).

2. Due Process

"A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument." *Young v. Masci,* 289 U.S. 253, 258, 53 S. Ct. 599, 77 L.Ed. 1158 (1933). As we have seen, the SLA imposes liability on out-of-state manufacturers of firearms (there are none in the District) for injuries caused to innocent persons from the "discharge of [an] assault weapon or machine gun *in the District of Columbia."* D.C. Code § 7-2551.02 (2001) (emphasis added). The defendants nevertheless argue that the SLA constitutes an attempt by the District to impose its own policy choices as to gun regulation on other states where the manufacture of machine guns is lawful, thereby violating due process. They rely principally on *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)--or more precisely on two sentences from *Gore.* The first is the Court's statement that "it follows from ... principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572, 116 S. Ct. 1589. The second, providing the due process link, is that "'[t]o punish a person because he has done what the law plainly allows him

to do is a due process violation of the most basic sort.'" *Id.* at 573 n. 19, 116 S. Ct. 1589 (citation omitted).

The defendants first of all confuse punishment--and the issue of punitive damages before the Court in *Gore*--with a state's authority to permit compensation to victims for injuries suffered within its jurisdiction. In *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), which also dealt with punitive damages and applied *Gore,* the Court made that distinction explicit. *See Id.* at 416, 123 S. Ct. 1513 (explaining the "different purposes" served by compensatory and punitive damages). One looks in vain in either *Gore* or *State Farm* for a suggestion that a state may not permissibly decide that certain products, whether manufactured within or outside a state, are so dangerous that their manufacturers should face strict liability in tort for injuries the products contribute to within the State. *Gore,* in fact, affirmed a state's right to impose "economic penalties" on out-of-state manufacturers, "whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages," so long as such penalties are "supported by the State's interest in protecting its own consumers." *Gore,* 517 U.S. at 572, 116 S. Ct. 1589.[15] Under *Gore,* the SLA would violate due process only if it penalized manufacturers "for conduct that was lawful where it occurred *and that had no impact on* [*the District*] *or its residents.*" *Id.* at 573, 116 S. Ct. 1589 (emphasis added); *see also State Farm,* 538 U.S. at 422, 123 S. Ct. 1513 (for punitive damage purposes, "[l]awful out-of-state conduct may be probative" if it has "a nexus to the specific harm suffered by the plaintiff"). In sum, no due process issue is raised by leg-

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[15] The SLA does not provide for any award of punitive damages; by its terms it permits recovery only for "all direct and consequential damages." D.C. Code § 7-2551.02.

islation that seeks to redress injuries suffered by District residents and visitors resulting from the manufacture and distribution of a particular class of firearms whose danger far outweighs their utility. *See, e.g., City of Boston v. Smith & Wesson Corp.*, 66 F. Supp. 2d 246, 250 (D. Mass. 1999) ("As plaintiffs here are seeking relief only on behalf of injured parties in Massachusetts, the holding of the *Gore* case does not apply.").

VI. Conclusion

For the foregoing reasons, the judgment of the Superior Court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, et al.,	
v.	No. Civ.A. 0428-00
BERETTA U.S.A. CORP., et al.,	Dec. 16, 2002

MEMORANDUM OPINION AND ORDER

LONG, J.

The crux of this lawsuit is that the District of Columbia and various individual plaintiffs endeavor to hold certain gun manufacturers financially liable for the economic impact of gun violence in the District of Columbia. More specifically, the individual plaintiffs seek financial compensation for their own damages, while the District pursues both monetary damages and injunctive relief.

The purpose of the instant opinion is to adjudicate the defendants' Motion for Judgment on the Pleadings, as well as the plaintiffs' "Third Motion for Leave to Amend Complaint." The latter is preliminary to the dispositive motion.

The plaintiffs are proceeding under an array of legal theories, and the defendants have raised multi-faceted legal

challenges to every allegation of the Complaint. Those challenges embrace issues that are statutory, constitutional, or otherwise rooted in well-established common law.

The heart of the defense motion is that the claims articulated by the plaintiffs are not subject to trial on the merits, either because of the failure to plead vital parts of the allegations, or because of rather specific legal barriers. In other words, defendants contend on multiple fronts that the claims are facially not properly before the Superior Court at all.

The procedural mode of attack presented by the defendants is tightly limited by the Rules of Civil Procedure. It is important at the outset to be clear about the role of the trial court. When a Motion for Judgment on the Pleadings is utilized, the trial court is not asked (and is not permitted) to pass judgment upon the underlying merits of the claims or to pass judgment on the wisdom of filing the suit. Instead, pursuant to Rule 12(c) of the Superior Court Civil Rules, a defendant's motion for judgment in its favor is based solely on what is stated strictly within the plaintiffs' own pleadings. Here, the pertinent pleading that is the subject of the motion is the Complaint, as it was originally filed and later amended for the purpose of adding more individual plaintiffs.

A Motion for Judgment on the Pleadings is to be adjudicated under the same standards that apply to a Motion to Dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Civil Rules. *See Osei-Kuffnor v. Argana,* 618 A.2d 712, 713 (D.C. 1993).[1] There is ample Rule 12(b)(6) case law that provides the stan-

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[1] Federal courts agree, as to the application of their analogous Rules. *See Westcott v. City of Omaha,* 901 F.2d 1486, 1488 (8th Cir. 1990); *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 11 (6th Cir. 1987).

dard for granting such relief. The law is clear that such a judgment in favor of the defendants would be supportable only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" *Owens v. Tiber Island Condo. Ass'n,* 373 A.2d 890, 893 (D.C. 1977); *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

When a trial court adjudicates a motion under either Rule 12(b)(6) or Rule 12(c), the "complaint must be construed in the light most favorable to the plaintiff, and its allegations taken as true." *McBryde v. Amoco Oil Co.,* 404 A.2d 200, 202 (D.C. 1979); *Atkins v. Indus. Telecomm. Ass'n,* 660 A.2d 885, 887 (D.C. 1995).

The parties in this action have presented very detailed and voluminous briefs and materials.[2] At the Court's invitation, they have submitted post-argument citations to case law that has been developing in other jurisdictions during the pendency of this case. Indeed, the instant case is one of first impression in the District of Columbia. The attorneys on both sides have cited case law from other jurisdictions, not because such decisions are controlling, but because the scrutiny by appellate courts of similar lawsuits can be useful and instructive.

As to the plaintiffs' motion regarding leave to amend the Complaint for a third time, the Court will grant the motion even though the defendants oppose it. While this will not affect the ultimate outcome of the defendants' motion, there is no sound reason to prevent the plaintiffs from their final attempt to include one last group of individual plaintiffs and their allegations. This Memorandum Opinion addresses all

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[2] Plaintiffs are supported by Amicus Curiae.

versions of the Complaint, including the Third Amended Complaint.

Based upon the following analysis of relevant case law and bedrock legal principles, this Court concludes that the arguments of the defendants are compelling as to the entry of judgment in their favor. The plaintiffs' myriad claims herein are burdened with many layers of legal deficiencies. The defendants are entitled to judgments in their favor even if every allegation in the Complaint is true.

THE PARTIES

The two original plaintiffs are the District of Columbia and Bryant Lawson. Later, other individual plaintiffs were added in the First Amended Complaint, as well as the Second Amended Complaint. In the First Amended Complaint, the additional plaintiffs are James Foster-el and Michelle Foster-el. In the Second Amended Complaint, the additional plaintiff is Patrick H. Mahoney. Both James Foster-el and Michelle Foster-el are acting as individuals as well as in their capacities of Co-Personal Representative of the decedent's estate of Helen Foster-el. They are her surviving husband and daughter. Mahoney is suing in his individual capacity as well as his capacity as the Personal Representative of the decedent's estate of Mary Caitrin Mahoney, his daughter.

A Third Amended Complaint is attached to the plaintiffs' motion, and they seek an order of this Court that would deem this amended version of the Complaint to have been filed as of the date on which the original Complaint was filed. In their motion, plaintiffs seek to add five more individual plaintiffs. Two are Personal Representatives of decedents estates and three are persons who were injured by gunshots, but who survived. See further discussion, *infra*.

The named defendants in this action are corporations engaged in the lawful manufacture and legal distribution of firearms. They are: Beretta U.S.A. Corp., B.L. Jennings,

Inc., Browning Arms Company, Bryco Arms, Inc., Carl Walther GMBH, Century International Arms, Inc., Colt's Manufacturing Co., Inc., Davis Industries, Inc., Forjas Taurus, S.A., Glock, Inc., Glock GMBH, H & R 1871, Inc., Heckler & Koch, Inc., Heckler & Koch, GMBH, Hi-Point Firearms, K.B.I., Inc., International Armament Corp., Navegar, Inc., Norinco Sports, U.S.A., Inc., Phoenix Arms, Inc., Pietro Beretta SP.A., Sigarms, Inc., Smith & Wesson, Corp., Strum, Ruger & Company, Inc., and Taurus International Manufacturing, Inc., and DOES 1-100.

THE ORIGINAL COMPLAINT

The Complaint that commenced this litigation was filed on January 20, 2000. It contains five Counts, preceded by a narrative theory as to how the defendants are connected to generalized "gun violence" in the District of Columbia. The allegations in the original Complaint are repeated almost verbatim in the First Amended Complaint, the Second Amended Complaint, and the proposed Third Amended Complaint. The five basic Counts are summarized briefly as follows, cited only to the original Complaint, for simplicity and ease of reference.

Certain theories of liability appear to thread through more than one Court. For example, Counts IV and V do not actually raise issues that are new and distinct from the substantive causes of action that are recited in other Counts. Counts IV and V are more in the nature of an operational theory as to how the District asserts its right to sue and how the damages should be determined in light of the multiplicity of defendants.

Count I--Strict Liability

In Count I, the District and Lawson allege that the defendants are strictly liable for money damages, pursuant to the statute known as the "Assault Weapons Strict Liability Act of 1990." Where the District is concerned, it asserts a

claim for recovery of Medicaid and other health care costs, as well as other types of monetary benefits paid to District citizens and employees who have been injured by illegal weapons. The District relies upon three statutes as the legal basis for its right to sue. *See* D.C. Code §§ 1-624.31, 3-502, and 4-502 (1981). These statutes are described further herein, cited to their current codification.

The "Assault Weapons Strict Liability Act of 1990," provides,

> Any manufacturer, importer, or dealer of an assault weapon or machine gun shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault weapon or machine gun in the District of Columbia.

D.C. Code § 7-2551.02 (2001).[3] This particular law states that the term "assault weapon" includes certain specific weapons enumerated according to their trade names, such as "Street Sweeper and Striker 12." D.C. Code § 7-2551.01(I) (2001). Under the Code, a "machine gun" is defined as "any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot: Automatically, more than 1 shot by a single function of the trigger [or] Semiautomatically, more than 12 shots without manual reloading." D.C. Code § 7-2501(10)(A-B) (2001).

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[3] When originally codified, the law was found in the published Code as D.C. Code § 6-2392 (1981).

The District alleges in the Complaint, "As a proximate result of the discharge in the District of assault weapons and machine guns manufactured, imported, or sold by Defendants, Plaintiff District has incurred and will incur great expenses for assistance and compensation provided to victims of this gun violence." Complaint at ¶ 77.

The District links the allegation under the Assault Weapons Act to a claim for money damages, stating,

> Defendants are strictly liable to Plaintiff District for (1) health care costs and Medicaid expenses the District has incurred for care and treatments of victims of this gun violence and (2) costs of other assistance and compensation provided or paid by the District to police officers, firefighters, and other District employees who have suffered injuries from this gun violence, which costs are recoverable under District statutes. D.C. Code §§ 1-624.31, 3-502, and 4-502. Defendants also are liable for any other costs incurred by the District that are recoverable by statute, in equity, or under common law.

Complaint at ¶ 78.

The three statutes under which the District seeks such reimbursements are described below.

First, under the "Health-Care Assistance Reimbursement Act of 1984," the Code provides, in pertinent part:

> Whenever the District provides health-care assistance to a beneficiary who has suffered an injury or illness under circumstances creating liability in a third party or under circumstances that would have created such a liability had the beneficiary instead of the District incurred the expense of the health-care assis-

> tance, it shall have an independent, direct cause of action against that third party for the unreimbursed value or cost of the health-care assistance provided.
>
> As soon as the District begins providing health-care assistance to a beneficiary, it shall become subrogated to any right or claim that the beneficiary has against a third party for the care and treatment it has undertaken to provide or pay for as health-care assistance.

D.C. Code § 4-602(a)-(b) (2001) (emphasis added).[4]

Second, under the "Medical Care Recovery Act of 1978," the Code addresses the issue of how the District may recover medical and leave expenses for firefighters and police officers. The Code provides in pertinent part,

> Whenever the District of Columbia is authorized or required by law to: (1) Furnish or pay the expenses for hospital, medical, surgical, dental care and treatment (including prostheses and medical appliance) or the funeral expenses of an officer or member of the Metropolitan Police Department or the Fire Department of the District of Columbia (hereinafter, "policeman or fireman"); or (2) extend leave of absence with pay to a policeman or fireman who is injured or suffers a disease under circumstances creating a tort liability upon a 3rd person to pay damages therefor, whether or not received or contracted in the performance

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[4] The law formerly was codified as D.C. Code § 3-502(a)-(b) (1981).

> of duty, the District of Columbia shall have a right to recover from said 3rd person the reasonable value of the care and treatment so furnished or to be furnished, or for which payment has been or will be made, and the amount of wages paid or to be paid during the leave of absence resulting therefrom, and shall as to such right be subrogated to any right or claim which the injured or diseased policeman or fireman, his guardian, personal representative, estate, dependents, or survivors has or have against such 3rd person to the extent of the reasonable value of the care and treatment so furnished or to be furnished, or for which payment has been or will be made, and the amount of wages based upon an authorized leave of absence paid or to be paid to such policeman or fireman.

D.C. Code § 5-602 (2001) (emphasis added).[5]

Third, pursuant to the "Comprehensive Merit Personnel Act of 1978," individual employees may seek compensation for injury or death, if incurred in the performance of his or her public duty. As to subrogation of such claims, the Code states,

> If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability on a person other than the District of Columbia government to pay damages, the Mayor *may require the beneficiary to do the following:*

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[5] This law was previously codified as D.C. Code § 4-502 (1981).

> *(A) Assign to the District of Columbia government any right of action he or she may have to enforce the liability ... or (b) Prosecute the action in his or her own name.*

D.C. Code § 1-623.31(a)-(b) (2001) (emphasis added).[6] The Code further specifies, "The Mayor may prosecute or compromise a cause of action *assigned* to the District of Columbia government." D.C. Code § 1-623.31(c) (2001) (emphasis added).[7]

Count II–Negligent Distribution

In Count II, the District and Lawson allege that the defendants engaged in "negligent distribution" of firearms. The plaintiffs described the "negligence" as consisting of the following factual theory.

Plaintiffs allege that the defendants have failed to take certain steps, which, in the view of the plaintiffs, could prevent the "unlawful flow" of firearms into the District of Columbia. Plaintiffs describe in the Complaint the various ways in which firearms have "unlawfully flowed" into this jurisdiction. They assert, for example,

> Many firearms have flowed unlawfully into the District by means of a 'straw purchase.' In a 'straw purchase,' the purchaser buys a firearm from a licensed dealer on behalf of another person who is not qualified to purchase the firearm under applicable federal, state, or

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[6] This provision was previously codified as D.C. Code § 1-624.31(a)-(b) (1981).

[7] This provision previously had been codified as D.C. Code § 1-624.31(c) (1981).

> District laws and regulations. Many of these firearms have been later used in crime. Often, these straw purchases have occurred under circumstances that indicated or should have indicated to the seller that a straw purchase was being made. Although Defendants knew or should have known that such straw purchases take place, they have not taken reasonably available steps to ensure that their distributors and dealers do not sell to straw purchasers.

Complaint at ¶ 53.

The plaintiffs further assert,

> A related method by which many firearms have flowed unlawfully into the District is through multiple sales. In such sales, the purchaser buys more than one firearm at a time or over a short period of time, from a licensed dealer with the intention of later selling or transferring some or all of the firearms to a person (or persons) who is not qualified to purchase firearms under federal, state, or District laws and regulations. Many multiple sales have occurred under circumstances that indicated or should have indicated to the seller that the firearms being purchased were destined for unlawful uses. Although Defendants knew or should have known that such multiple sales take place, they have not taken reasonably available steps to ensure that their distributors and dealers adequately curb such multiple sales.

Complaint at ¶ 54.

The plaintiffs allege other ways in which guns illegally enter the District. They describe, for example, so-called "kitchen table" dealers who have federal licenses to sell firearms, but who do not operate from retail stores. Complaint at ¶ 55. They also cite the problem of guns being stolen outright from licensed dealers who do not have adequate security. Complaint at ¶ 56. Plaintiffs describe how felons are able to buy weapons at "gun shows" where the sellers do not perform background checks of purchasers. Complaint at ¶ 57. The plaintiffs also complain that serial numbers are easily obliterated, so as to prevent tracing by law enforcement officers, and that defendants have failed to take steps to make serial numbers "more tamper-resistant." Complaint at ¶ 58.

Overall, the plaintiffs contend that the defendants were negligent because they had many sources from which to know all the ways guns flow illegally into the District and that they failed to take "reasonably available" steps to "restrict or impede" such unlawful traffic. They contend, for example, that the defendants failed to "adequately investigate or screen the distributors and dealers through which Defendants distribute and sell firearms," that the defendants could "establish a tighter and more direct distribution system in which Defendants remain in control of the distribution of their products," and that the defendants could "require their distributors and dealers to refuse to sell more than one handgun per month to any person not holding a federal firearms license, and to track sales to enforce this restriction." Complaint at ¶ 65 (a), (d), and (g). The Complaint contains many other alleged methods that the defendants failed to employ to stop the illegal entry of guns into the District. The Court need not repeat all of them. It suffices to say that the examples quoted above fairly provide the gist of the sorts of actions that plaintiffs contend could have been implemented by the defendants.

On balance, the plaintiffs ultimately assert that the defendants "have the ability to require and to enforce responsible distribution practices by requiring their dealers to enter into agreements under which the dealers may be suspended or terminated for failure to adhere to specified business practices." Complaint at ¶ 66.

Specifically, in their prayer for relief, the plaintiffs seek compensatory damages "attributable to each Defendant," punitive damages, and a "permanent injunction enjoining Defendants' negligent practices in the marketing and distribution of their firearms." Complaint at p. 29.

Count III--Public Nuisance

In Count III, the District (acting as the sole plaintiff on this issue) asserts that the corporate activity of the defendants *outside* of the District of Columbia creates a common law "nuisance" *within* the District of Columbia. The District demands two forms of relief. First, the District seeks "in its *parens patriae* capacity, a permanent injunction and other equitable relief, including but not limited to restitution, for abatement of the nuisance that Defendants have created and maintained." Second, the District demands money damages "attributable to each Defendant to compensate the District for health care assistance and other recoverable costs it has incurred and will continue to incur as a result of the ongoing nuisance created and maintained by Defendants." Complaint at p. 29.

Count IV--Subrogation Claims of the District

In Count IV, the District alleges that it is the "subrogor" of firefighters, police officers, and miscellaneous other public employees and citizens, who individually would have a basis for a lawsuit against the defendants for the costs of health care and other such claims. This Count essentially recites a broad subrogation claim by the District under the three health care reimbursements statutes cited under Counts I and II.

Here, the District substitutes itself for any and all public employees or citizens who could sue the defendants on their own, under these three statutes.

Count V--Collective Liability

In Count V, the District attempts to set forth a claim described as "collective liability." No statute whatsoever is cited as grounds for this claim or this theory of calculation of damages. The plaintiffs state only that the defendants "are collectively liable for the particular harms to Plaintiffs because Defendants' tortious conduct has collectively caused the circumstances that have caused the particular harms to Plaintiffs." Complaint at ¶ 102.

ANALYTICAL FRAMEWORK FOR THE COURT'S DECISION

As the law requires, the Court gives a generous reading to the Complaint, so as to view it in the most inclusive way possible. The Court will presume, *arguendo,* that the plaintiffs intend to rely on subrogation for relief under Count I and partially under Count II. Subrogation is not relevant to Count III.

In deciding the instant motion, the Court's ruling on the legal validity of any particular theory certainly applies to that theory wherever it might appear or be implied in the Complaint. The same is true with respect to the First, Second, and Third Amended Complaints. The Counts therein are virtually identical to those in the original Complaint.

As to the case law presented by the parties from courts of other jurisdiction, this Court will quote from such authorities to the extent warranted, where such conclusions inform this Court's own determinations. These considered appellate rulings are especially helpful because they reflect thoughtful analysis of nearly identical allegations and responses thereto.

THE FIRST AMENDED COMPLAINT

The core allegations were not changed or enlarged. The operative difference between the original Complaint and the First Amended Complaint is the addition of three more individual plaintiffs.

James and Michelle Foster-el assert that Helen Foster-el was fatally shot in the District of Columbia, and that her wounds are attributable to the use of 9 mm ammunition. They specify, "The bullets that killed Helen Foster-el were fired by one or more "machine guns" or "assault weapons," as these terms are defined by the Strict Liability Act which guns were manufactured, imported, or sold by Defendants." First Amended Complaint at ¶ 61. The substantive allegations and theories of the case remain the same as those articulated in the original Complaint.

THE SECOND AMENDED COMPLAINT

The Mahoney claim, added in the Second Amended Complaint, is similar to that of the Foster-els. It is based upon the murder of Mr. Mahoney's daughter on or about July 6, 1997, during a robbery at a District of Columbia store. The store was a Starbucks Coffee store in Georgetown. In his Complaint, Mahoney states that the robber, Carl Cooper, was armed with two weapons: a .380 caliber semi-automatic handgun and a .38 caliber revolver. Second Amended Complaint at ¶ 66. He further alleges that one .380 caliber bullet was recovered from his daughter's chest and that others passed through her body. He states, "The bullets that killed Ms. Mahoney were fired by one or more "machine guns" or "assault weapons," as these terms are defined by the Strict Liability Act, which guns were manufactured, imported, or sold by Defendants." Second Amended Complaint at ¶ 72.

PLAINTIFFS' MOTION REGARDING THIRD AMENDED COMPLAINT

In their pending motion, the plaintiffs seek to add five individual plaintiffs to this case: Laura Wallace, Madilla R. Marsh-Williams, Ahmad Vaughan, Avery Blue, and Gregory Ferguson.

Wallace and Marsh-Williams desire to sue personally and in their respective capacities as the Personal Representatives of the estates of Andre Wallace and Natasha Marsh. The two deceased persons were students at Wilson High School and were murdered by gunfire on February 8, 2000. The Third Amended Complaint alleges that one of the persons who attacked the pair was "armed with a 9 mm pistol." Third Amended Complaint at ¶ 82. It alleges that "police recovered nine 9 mm shell casings at the shooting scene." Third Amended Compliant at ¶ 86. Moreover, the plaintiffs contend that during autopsies, "the coroner recovered at least one 9 mm bullet from both Wallace's and Marsh's bodies." Third Amended Complaint at ¶ 87.

Where Ferguson, Vaughan and Blue are concerned, they base their proposed suit on injuries each suffered from gunfire on June 17, 1998, in the same incident. They claim that the persons who attacked them were part of a gang and that they were "armed with several weapons, including a pump shotgun, a 9 mm handgun, and an AK-47 weapon." Third Amended Complaint at ¶ 92. They allege that they were each "hit by the AK-47-type weapon." Third Amended Complaint at ¶¶ 101-103.

The plaintiffs' motion is opposed by the defendants. They contend that the Court should not permit the filing of this third version of the Complaint for a variety of reasons, but largely because the claims have no merit. Defendants' Memorandum in Opposition to Plaintiffs' Third Motion for Leave to Amend Complaint at 10-11. The defendants also complain that adding more plaintiffs causes prejudice to the

defendants by enlarging the complexity of the case. One of the main contentions of the defendants is that the attempt to add these particular plaintiffs is a mask for generating sympathy for a case that is legally weak. Defendants argue,

> The District undoubtedly hopes to bolster its generalized claims by any sympathy that can be generated from the specific situations of these unrelated individual plaintiffs. The District's desire for such a coattail effect does not justify the joinder of disparate claims seeking different relief and based on different underlying facts.

Memorandum in Opposition at 7-8.

The Court is convinced that it would be unfair to deny this particular motion, because the case is at a very early stage and there is no discernable prejudice to the defendants at this juncture. The arguments in the lawsuit do not change in the proposed Third Amended Complaint, and the litigative burden on the defendants is no different. Usually, leave is freely granted to amend a Complaint, as long as a case is in the early stages of litigation, where there is no bad faith, and where the new aspect of the Complaint does not work any palpable prejudice on the defendants. *See Bennett v. Fun & Fitness of Silver Hill, Inc.*, 434 A.2d 476, 478-79 (D.C. 1981). To the extent that defendants point to a difficult and complex theory of liability as evidence of "prejudice," this argument is not meritorious. The complexities of the plaintiffs' theory of liability only highlight that the plaintiffs have a difficult case to prove. This is not prejudicial to the defendants.

The Court notes that the plaintiffs have vowed not to attempt any more additions of new plaintiffs. They state, "Plaintiffs have no intention, absent unforeseen circumstances, to further move to amend our complaint to add addi-

tional plaintiffs." Third Motion for Leave to Amend Complaint at 3.

Indeed, this Court would not expect the District to attempt to enlarge this case any further, because there cannot be any such circumstances that are "unforeseen." The District has contended that the individual plaintiffs themselves sought out legal representation by the Office of Corporation Counsel. There is no basis for doubting this statement.[8] There is no real exigency of the District of Columbia that should suddenly, in the future, create a real need for the District to add more and more parties to the case. This is not a class action, and the District owes no duty to provide free legal services to any individual plaintiffs. Apparently, the District has done so here for its own reasons. Moreover, the existing individual plaintiffs have no particular need to add others to their case, since the contentions are all fact-bound as to the person involved. Merely adding other plaintiffs does nothing to improve the quality of any other plaintiff's case.

Understandably, the defendants are wary that the District seeks the advantage of name-recognition of some of the plaintiffs, because of the well-publicized circumstances of

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[8] This is a credible assertion by the plaintiffs, because if the District had been trolling for cohort plaintiffs, it presumably would have selected victims of crime who were injured or killed by guns that were actually recovered. The involvement of a recovered weapon might potentially moot many of the legal deficiencies associated with the plaintiffs' reliance on the Strict Liability Act. If anything, relying on allegations based on incidents of non-recovered weapons is certainly not the best strategy for this debut litigation under the Strict Liability Act. See further discussion, *infra* in text regarding Count I.

their deaths. However, this has no bearing on the legal issues that compel granting the defendants' motion, and the sympathy theory is not strong enough otherwise to deny the plaintiffs' procedural motion. Since this Court's grant of the defense motion is on grounds that would apply to any plaintiff making the same assertions, it is not logical or practical to leave the litigation in an uncertain posture, creating a needless controversy over the denial of leave to amend the Complaint.

ISSUES RAISED BY DEFENDANTS

Reviewing each of the Counts, the essence of the defendants' motion is summarized as follows.

In Count I (strict liability), defendants contend that the plaintiffs cannot establish the requisite elements to plead or recover damages under the District's "Assault Weapon Strict Liability Act." The defendants identify specific aspects of the claim itself, to illustrate why there can be no recovery under this statute, even if all the allegations in Count I are true. Moreover, the defendants contend that this particular law is unconstitutional, as a prohibited form of infringement upon interstate commerce. In this regard, defendants assert that the Act impermissibly seeks to regulate lawful conduct that occurs outside the geographical boundaries of the District of Columbia.

As to Count II (negligent distribution), defendants emphasize that the allegations cannot be sustained as a matter of law because there is no common law duty that could have been breached, and because the claims are too remote to establish proximate cause.

Count III (common law public nuisance) is challenged because, as defendants argue, key elements of the claim cannot be established by any means. Those pivotal elements are in the alternative, (a) the use of land in creating or perpetuating the alleged nuisance, or (b) the existence of a statute that

permits such a lawsuit, whether or not land is involved. Defendants argue that the nature of common law public nuisance cannot be stretched to serve as a basis for relief in this particular lawsuit.

Regarding Count IV, defendants seek a judgment in their favor based upon the failure of the plaintiffs to plead certain specific facts that are necessary to create individual, subrogated claims. Existing law already requires such specific pleading. Defendants add that the District, as a matter of law, has no right to group together *aggregated* subrogation claims, so as to create liability "in gross."

Count V is challenged because case law precludes the District from seeking money damages to reimburse it for the cost of public safety services, including police and fire services that are related to gun violence. In short, defendants argue that this aspect of the lawsuit is not legally sustainable because of the "professional rescuers doctrine," already recognized in the law of the District of Columbia. Moreover, defendants specifically attack the use of "collective liability" theory under which money damages might be calculated. This argument includes an attack on the plaintiffs' so-called "market share" analysis as a theory for assessing and apportioning damages amongst the various defendants. Whether or not using that terminology, however, the defense attacks any formulation of damages that would be predicated upon non-individualized liability.

ANALYSIS OF THE ISSUES

The most efficient approach to parsing the issues is to examine the particular legal arguments raised by defendants, and to compare their merits to the responses of the plaintiffs. In this fashion, relating to each cause of action in the Complaint, the failure to sufficiently plead the allegations is best exposed.

It is not particularly helpful to discuss the issues in the same numeric order in which they are raised in the Counts of the Complaint. There is an interplay between the Counts, each of which provides context for another. Consequently, the Court will begin its analysis with the more fundamental issues regarding negligence and nuisance (Counts II and III). The case law that is instructive in these areas forms a solid background for treatment of the more detailed questions or narrower issues raised in Counts I, IV, and V.

Count II: Negligence--Absence of Legal Duty and Remoteness of the Claims

In addition to reliance upon the Strict Liability Act, the District and other plaintiffs demand damages under a theory of common law negligence. The defendants attack the sufficiency of the pleading by emphasizing that the key elements of common law negligence cannot be established as a matter of law, even if the factual allegations of the Complaint are true. They argue that (1) defendants do not owe a duty to the plaintiffs and (2) even if such a duty exists, the plaintiffs have no standing to sue because their claims are too remote to establish proximate cause. Defendants rely upon local common law to demonstrate the absence of a legal duty. They also cite relevant appellate law from state and federal courts, where this same type of lawsuit has met with failure for the same reasons argued by defendants herein.

The plaintiffs in this case are not the first to launch this type of litigation. Very seldom has a claim of this nature survived on appeal after the initial dismissal of the Complaint.

It is efficient to divide an analysis of the common law negligence claim into separate discussions of (1) the absence of a legal duty, and (2) the remoteness or proximate cause issue.

1. The Lack of a Legal Duty. The real underpinning of the demand for damages in this case is that damages arise

from the intervening behavior of criminals. The District of Columbia Court of Appeals has observed, "In general no liability exists in tort for harm resulting from the criminal acts of third parties, although liability for such harm sometimes may be imposed on the basis of a special relationship between the parties." *Hall v. Ford Enter. Ltd.*, 445 A.2d 610, 611 (D.C. 1982); *see also Caldwell v. Bechtel, Inc.*, 203 U.S. App. D.C. 407, 417-18, 631 F.2d 989, 999-1000 (1980) (citing W. Prosser, HANDBOOK OF THE LAW OF TORTS, § 56, at 341-42 (4th ed. 1971)).

"Traditionally, relationships that were considered to give rise to a duty of one party to protect the other party from foreseeable criminal acts of third persons have included the relationships of landowner to invitee, businessman to patron, employer to employee, school district to pupil, hospital to patient, and common carrier to passenger." *Hall, supra,* at 611 n. 4.

In terms of legally sufficient pleading, the obligation of the plaintiffs herein is to set forth, even very briefly, facts from which such a special relationship can be discerned. They have not done so. Even assuming that the plaintiffs could establish that their injuries were foreseeable by the defendants (which is a separate issue), their common law claim must fail.

In the instant case, there is absolutely no allegation of any "pre-existing" relationship between any of the plaintiffs and any of the defendants. For this reason alone, the common law claims must fail as a matter of law.

Significantly, the District of Columbia Court of Appeals already has declined specifically to recognize any duty of a private entity to protect members of the public from injury caused by violent crime, particular involving the use of firearms. Those cases are summarized as follows.

The District of Columbia Court of Appeals has firmly held that District law does not support a cause of action against a gun manufacturer for injuries caused by the criminal use of the weapon, in the absence of any relationship between the particular plaintiff and defendant. *Delahanty v. Hinckley,* 564 A.2d 758, 762 (D.C. 1989). In *Delahanty,* a police officer filed a common law negligence suit against certain manufacturers and distributors of a firearm that was used to shoot him during the attempted assassination of President Reagan. The firearm in question was known colloquially as a "Saturday Night Special."

The Complaint in *Delahanty* was filed in the United States District Court for the District of Columbia. The trial judge dismissed the suit for failure to state a claim upon which relief could be granted. On appeal, the United States Court of Appeals certified to the District of Columbia Court of Appeals the question whether, in this jurisdiction, "manufacturers and distributors of Saturday Night Specials may be strictly liable for injuries arising from these guns' criminal use." *Id.* at 759. The District of Columbia Court of Appeals answered the question in the negative, applying its ruling to both strict liability and ordinary negligence concepts.

The Court of Appeals found that the law of the District of Columbia does not impose a duty on a firearm manufacturer to refrain from, to limit, to restrict, or to monitor the lawful, regulated retail distribution of its products outside the District. *Id.* at 761-62. This appellate holding alone requires this Court to grant defendants' Motion for Judgment on the Pleadings as to Count II.

The ruling in *Delahanty* should not have been a surprise to anyone. Indeed, years before the ruling in *Delahanty,* the Court of Appeals concluded that the mere fact that the hazard of crime exists in the District of Columbia does not mean that a duty to protect the public from such crime is automatically imposed upon private enterprises. *See Cook v. Safeway*

Stores, Inc., 354 A.2d 507, 509 (D.C. 1976). In *Cook*, a customer sued the drug store unsuccessfully for injuries she incurred while pursuing the snatcher of her purse.

The importance of *Delahanty* to the lack of common law duty in the present case cannot be minimized. The particular theory on which the plaintiff in that case sought to create a "duty" is one that is strikingly similar to the allegation of "negligent distribution" in the instant case.

In the present case, the plaintiffs assert that the manner in which the defendants permit firearms to be distributed and sold, in and of itself, is negligent. The plaintiffs contend that injuries could be avoided if, for example, the defendants would "curb" what are described as "multiple sales" to single buyers. Yet, such sales are completely legal. In *Delahanty*, the allegation of negligence was founded upon the theory that the defendants knowingly allowed the sale of inexpensive handguns known as "Saturday Night Specials." Delahanty alleged in his Complaint,

> Hinckley needed an easily concealable weapon for his assassination attempt; the gun manufactured by Roehm and R.G. Industries, Inc., is an easily concealable, inexpensive handgun; the gun is poorly constructed, unreliable, and therefore not useful for legitimate purposes such as military use, target practice, or self-defense; as a result of the gun's low price, it is used for criminal purposes; and the manufacturers knew of the gun's criminal uses.

Id. at 759.

In rejecting the negligence theory, the Court of Appeals in *Delahanty* stated, "[W]e conclude that traditional tort theories--negligence and strict liability under the RESTATEMENT (SECOND) OF TORTS--provide no basis for holding

the gun manufacturer liable." *Id.* at 759-60. The Court elaborated as follows:

> Appellants argue that the marketing of the guns is the abnormally dangerous activity for which the manufacturers should be held liable. We cannot agree. The cause of action under RESTATEMENT § 519 applies only to activities that are dangerous in themselves and to injuries that result directly from the dangerous activity. 'The marketing of a handgun is not dangerous in and of itself, and when injury occurs, it is not the direct result of the sale itself, but rather the result of actions taken by a third party.'

Id. at 761 (quoting *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1265 n. 43 (5th Cir. 1985)).

The Court of Appeals added,

> Furthermore, handgun marketing cannot be classified as abnormally dangerous by applying the factors of RESTATEMENT § 520. For example, any high degree of risk of harm, or any likelihood that such harm will be great, would result from the use, not the marketing as such, of handguns. Finally, were we to hold a manufacturer liable for gun marketing as an abnormally dangerous activity, we would improperly blur 'the distinction between strict liability for selling unreasonably dangerous *products* and strict liability for engaging in ultrahazardous *activities* by making the sale of a product an activity.' We are unwilling to do so.

Id. at 761, citations omitted (quoting *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1203-05 (7th Cir. 1984)

(italics in original)). Having received a resolution of this legal issue by the local court of appeals, the United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the Complaint. *Delahanty v. Hinckley,* 283 U.S. App. D.C. 384, 900 F.2d 368 (1990).

In *Delahanty,* the plaintiff's allegation focused on the very inexpensive pricing of the "Saturday Night Special" and suggested that this was part of what made the product such a danger to the public. As a practical matter, there is no real difference between alleging that a gun manufacturer or distributor or importer owes a duty to a plaintiff because of its pricing of certain products, or because of its business relationships with other lawful entities within the marketing chain. The factor of distribution structure, like pricing, is only one piece of the overall mosaic of "marketing." Consequently, the plaintiffs' negligent distribution theory is foreclosed by *Delahanty.*

Based upon the fundamental concept of *stare decisis,* this Court is required to apply *Delahanty.* On the common law negligence claims, this Court is simply not free to do otherwise.

Notably, the plaintiffs seem to rely upon various appellate decisions that recognize common law liability under a theory of negligent marketing, where the product in question (in plaintiffs' words) was "far less dangerous" than firearms. Opp. at 22. *See Hunnings v. Texaco, Inc.,* 29 F.3d 1480, 1483-86 (11th Cir. 1994) (mineral spirits manufacturer held liable for injury caused by retailer's negligent sales, where it knew its product was commonly sold in illegal and dangerous manner by retail stores); *Suchomajcz v. Hummel Chem. Co.,* 524 F.2d 19, 24-25 (3rd Cir. 1975) (manufacturer could be liable for negligently selling chemical to fireworks kit maker); *Moning v. Alfono,* 400 Mich. 425, 254 N.W.2d 759, 765-66 (Mich. 1977) (manufacturer owes duty of due care in making, marketing and distributing sling shots). Plaintiffs

seem to suggest that those cases from other jurisdictions should convince this Court to ignore *Delahanty*. However, those other cases cannot make *Delahanty* disappear.

Even if the ruling in *Delahanty* did not exist, this Court would be compelled to recognize that these three cases cited by the plaintiffs are distinguishable and are not instructive. Each is reviewed as follows.

In *Hunnings,* the United States District Court for the Northern District of Florida dismissed the Complaint under Rule 12(b)(6), where parents of a 22 month-old child sued because the child ingested mineral spirits that were stored in an old milk container, devoid of warnings. This dismissal was reversed by the United States Court of Appeals for the Eleventh Circuit, based upon pre-existing common law principles that facially appeared to apply to the particular defendant. Florida law already recognized that a bulk manufacturer could be found liable for injuries that result where the manufacturer already knows that the "downstream" distributor is not giving adequate warnings about the product to the "end user." *Hunnings, supra,* at 1485 (*citing Tampa Drug Co. v. Wait,* 103 So.2d 603, 607 (Fla. 1958)). In that case, the plaintiff specifically had alleged in the Complaint that the manufacturer was aware that its product was being "routinely sold in milk containers at the retail level which lacked adequate warnings as required by law." *Id.* at 1482. Moreover, the sufficiency of the negligence allegation was supported by an existing federal statute that prohibits the introduction of a hazardous substance into interstate commerce "in a reused food container." *Id.* at 1482; 15 U.S.C. § 1263(f). These statutory supports for the existence of a legal duty are not present in the instant case.

In *Hunning,* the entire case turned on the requirement of establishing a "duty to warn." Only a breach of that duty could produce a judgment for the plaintiffs. Yet, in *Delahanty,* the Court of Appeals specifically pointed out that there

was no "duty to warn" anyone about the dangers of criminal mis-use of guns. *Delahanty, supra,* at 760 (citing the Restatement (Second) Of Torts, 402A cmt. j). If the defendants herein have no actionable "duty to warn" anyone about the dangers of firearms, they certainly have no duty to keep firearms out of the hands of criminals or negligent persons who somehow "mis-use" a weapon.

In *Suchomajcz,* a group of minors (through their parents and fiduciaries) filed suit against certain manufacturers of chemicals that were used as components of fireworks. The children had been injured or killed which such components were sold to them in "fireworks assembly kits." *Suchomajcz, supra,* at 22. Their lawsuit was based on theories of common law negligence, as well as strict liability. The suit was initially dismissed. The dismissal was reversed because the Complaint had fairly articulated a factual issue that could only be resolved by a jury. The factual issue, in a nutshell, was the manufacturer's relationship with its customer (which fabricated and sold the kits to children). In the instant case, there is no jury-triable issue about whether the plaintiffs and defendants had a "pre-existing relationship."

The third case cited by the plaintiffs is inapposite to the present lawsuit. In *Moning,* a child sued a playmate who hit him in the eye with a slingshot. The plaintiff also sued the manufacturer, retailer, and the wholesaler of the slingshot. This particular case proceeded to trial, and the trial court directed a verdict in favor of the corporate defendants. This ruling was reversed because the evidence produced a factual question that could only be answered by a jury. The factual dispute was whether these particular defendants (who directly marketed slingshots to children) created an "unreasonable" risk of harm. *Id.* at 762. The alleged risk created by the defendants was their *purposeful* decision to market these items to children. The issue in *Moning* was not a question about sufficiency of the Complaint itself. Rather, it was a

fact-driven issue to be decided by a jury of "reasonable persons being of different minds." *Id.* at 762.

By recognizing the significance of *Delahanty* and other District of Columbia case law, this Court need not dwell further upon the issue of lack of legal duty. Naturally, where there is no duty, there can be no breach of duty that would be the foundation for liability. Nonetheless, it is important to note that appellate case law has developed around the Nation, finding fault with the kinds of pleadings that are the same as those filed herein. In those cases also, Complaints have been dismissed (or dismissals upheld) for the very same reasons argued by the defendants herein. Briefly, this Court will summarize that developing body of case law.

The key state decisions that most vividly support granting the defendants Motion for Judgment on the Pleadings are: *Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 110 Cal. Rptr. 2d 370, 28 P.3d 116 (Cal. 2001), *Hamilton v. Beretta, U.S.A. Corp.*, 96 N.Y.2d 222, 727 N.Y.S.2d 7, 750 N.E.2d 1055 (N.Y. 2001), and *Penelas v. Arms Technology, Inc.*, 778 So.2d 1042 (Fla. Dist. Ct. App. 2001).

The federal appellate decision that is consistent with this Court's own view of the legal duty issue is *City of Philadelphia v. Beretta, U.S.A. Corp.*, 277 F.3d 415 (3rd Cir. 2002).

The most instructive appellate opinion of all, in this Court's view, is found in the decision of the New York Court of Appeals in *Hamilton v. Beretta*. The history of that case, the nature of the allegations, and the development of the appellate result are all worthy of in-depth discussion.

The litigation in *Hamilton* began as a lawsuit in the United States District Court for the Eastern District of New York, filed by two persons (who were relatives of people killed with handguns) suing a large group of manufacturers, on theories of negligent marketing, design defect, conducting ultrahazardous activity, and fraud. The United States District

Court eventually dismissed the fraud and product liability claims, but allowed trial to commence on a negligent marketing theory.[9] More plaintiffs joined the case. After much procedural litigation over personal jurisdiction and other issues, the remaining plaintiffs voluntarily withdrew their claims against distributors, and proceeded to trial only against the manufacturers.

When seven plaintiffs finally went to trial against 25 defendants, their allegations were analogous to those in the instant Complaint. The Second Circuit summarized the character of the allegations:

> Plaintiffs asserted that defendants distributed their products negligently so as to create and bolster an illegal underground market in handguns, one that furnished weapons to minors and to criminals involved in the shootings that precipitated this suit. Plaintiffs offered evidence tending to show that defendants' actions contributed to the development and expansion of a huge illegal market for guns, and that this illegal market enabled their criminal misuse.
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> Plaintiffs further contended that defendants' duty to exercise reasonable care in the marketing and distribution of handguns arose from four factors: (1) their ability to control the marketing and distribution of their guns; (2) their knowledge that large numbers of the guns they manufacture enter the illegal market and are used to commit crimes; (3) New

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[9] *See Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1315 (E.D.N.Y. 1996).

> York's policy of strict regulation of firearms; and (4) the uniquely lethal nature of defendants' products.

Hamilton v. Beretta U.S.A. Corp., 222 F.3d 36, 40 (2nd Cir. 2000). This theory of liability is a virtual carbon copy of the plaintiffs' allegations in the instant case.

After four weeks of trial, the jury in *Hamilton* returned a verdict in favor of some defendants and against others. Eventually, the jury awarded money damages only against three of the defendants. *Id.* at 40-41. Those three defendants appealed to the United States Court of Appeals for the Second Circuit. The Circuit then certified to the highest court of New York (the New York Court of Appeals) two questions: (1) whether defendants owed the plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture; and (2) whether liability in this case may be apportioned on a market share basis, and if so, how? The responses to both questions resulted in a favorable ruling for the defendants, when the United States Court of Appeals for the Second Circuit accepted the certified legal determinations of the New York Court of Appeals. *See Hamilton v. Beretta U.S.A., Corp.*, 264 F.3d 21 (2nd Cir. 2000). The judgments against the three defendants were vacated, with instructions to the trial court to dismiss the cases. *Id.* at 32.

New York's highest appellate court, in responding to the certified questions, carefully noted the underlying factual allegations in *Hamilton,* stating, "According to plaintiffs, handguns move into the underground market in New York through several well-known and documented means including straw purchases ... sales at gun shows, misuse of Federal firearms licenses and sales by non-stocking dealers." *Hamilton v. Beretta, supra,* 727 N.Y.S.2d 7, 750 N.E.2d at 1059-60.

The New York Court of Appeals held that the defendants owed no common law duty to relatives of victims of crime on a theory of negligent marketing and that application of a theory of "market share" liability was improper. *Id.* at 1066, 1068.

The keystone of this appellate holding as to common law negligence is the cautious examination of the realistic roots of "legal duty." The Court reasoned that "judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another." *Id.* at 1061. Legal duty, as the Court emphasized, arises where a defendant's actual relationship with either the tortfeasor or the plaintiff finds "the defendant in the best position to protect against the risk of harm. In addition, the specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship." *Id.* The most useful example, as the Court pointed out, is the duty of a landowner to protect tenants and invitees--but only as to harm that would occur on the owner's premises--not elsewhere. *Id.* In the present case, the class of potential plaintiffs certainly cannot be "circumscribed by the relationship."

Using the landowner analogy, the New York Court of Appeals concluded that it could find no duty from gun manufacturers to the general public, as a landowner has no duty to "the millions of individuals who use the sidewalks of New York City each day and are thereby exposed to the dangers of street crime." *Id.*[10] Similarly, the New York Court of Appeals observed that

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[10] The Court relied upon a prior ruling that the owner of a housing project who failed to keep door locks in good repair did not

[Footnote continued on next page]

> the connection between defendants, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief.

Id. at 1062. The Court concluded,

> Such broad liability, potentially encompassing all gunshot crime victims, should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs. Giving plaintiffs' evidence the benefit of every favorable inference, they have not shown that the gun used to harm plaintiff [ ] came from a source amenable to the exercise of any duty of care that plaintiffs would impose upon defendant manufacturers.

Id. Similarly, the plaintiffs herein do not purport to be able to link their discrete injuries or deaths to a particular weapon that came from any one defendant.

This particular articulation of the lack of a legal duty is especially relevant to the case before this Court. This is because the plaintiffs' case rests on the notion that the defen-

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[Footnote continued from previous page]

owe a duty to a passerby to protect her from being dragged off the street into the building and assaulted. *Waters v. New York City Hous. Auth.*, 69 N.Y.2d 225, 513 N.Y.S.2d 356, 505 N.E.2d 922 (N.Y. 1987).

dants' legal duty arises because of acts of persons who are pure interlopers (*i.e.* criminals) with no role in the normal marketing journey between a manufacturer, importer or distributor and a legitimate purchaser.[11]

Most importantly, the New York Court of Appeals warned of the impropriety of expanding the concept of "foreseeability" to create a duty that does not otherwise already exist. The Court stated, "Foreseeability, alone, does not define duty--it merely determines the scope of the duty once it is determined to exist." *Id.* at 1060. This concept is especially valuable in the instant case, because plaintiffs contend that violent crime using defendants' products is "foreseeable" by the defendants.

In short, the negligence allegation in *Hamilton* and the one in the instant case are basically mirror images of each other. Just as the allegations in *Hamilton* were found facially insufficient as a matter of law, the claim in the present case also should be dismissed.

Merrill v. Navigar, Inc. illustrates another interesting scenario in which the attempt to pursue a common law negligence theory failed. In *Merrill,* there was a unique interplay between a pre-existing statute that precluded the use of "product liability" allegations against gun manufacturers and the plaintiffs' effort to use creative pleading to avoid the reach of that law. The California legislature had enacted a

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[11] The New York Court of Appeals paused to add that it was "neither feasible nor appropriate" for a court to impose upon gun manufacturers the duty to investigate so-called "downstream" local retailers merely on the basis of "trace requests" made by the Bureau of Alcohol, Tobacco and Firearms. *Id.* at 1065, 513 N.Y.S.2d 356, 505 N.E.2d 922. This is the province of law enforcement agencies.

prohibition on suing gun manufacturers for damages caused by gun violence, where such lawsuits are based upon an allegation of defective products. The statute, by all accounts, would have precluded a suit based upon allegations of negligent advertising, negligent marketing, etc. The plaintiffs in *Merrill* made a coy attempt to disavow reliance upon allegations that might have been worded like those herein. Instead, they articulated the tort as a "negligent" decision to market one particular weapon to the general public. *Merrill, supra,* 110 Cal. Rptr. 2d 370, 28 P.3d at 131 n. 7. The plaintiffs focused on the marketing of a weapon known as a "Tec9."

The Supreme Court of California concluded that the novel choice of words in the pleading was a rather transparent mask for a lawsuit that was precluded by legislated public policy. What is important is the California Court's emphasis that gun manufacturers simply owed no sweeping duty to prevent gun violence or to conform business operations so as to minimize or prevent gun violence. *Id.* at 126-128.

The Supreme Court of California ruled that the unusual lawsuit filed in that case did not pass muster under the equivalent of Rule 12(b)(6) because by the nature of the allegations, taken as true, the California Code precluded the maintenance of the lawsuit altogether. *Id.* at 131.

To be sure, the instant case is not controlled by any District of Columbia statute that would preclude the common law negligence count. However, the existing common law of California firmly recognized the need to establish both duty and causation in a common law negligence action, and the statute in question merely refined the limits of duty, *Id.* at 123-124, eliminating a potential claim of duty in certain types of cases. The California Code provision that was addressed in *Merrill* was merely designed to preclude certain litigation without regard to whether common law duty could have been established. Consequently, where ordinary tort duty is concerned, the real value of the decision and analysis

in *Merrill* is that California's common law remains no different than the common law of the District of Columbia. As the California Supreme Court noted, one of the objectives of the legislature was (in its own words) "to 'stop at birth' the notion that manufacturers and dealers are liable in products liability to victims of handgun usage." *Id.* at 127.

The ruling in *Merrill* is useful because it reflects another facet of appellate court rejection of this type of litigation, however cleverly the allegations might be framed. The lesson of *Merrill* is that novel labeling of negligence allegations will not shroud the real issue.

A Florida appellate court last year also affirmed the dismissal of a case analogous to the instant litigation. *Penelas v. Arms Tech., Inc., supra.* In that decision, the principal issues were whether the plaintiff had sufficiently pleaded an allegation of negligent distribution of firearms, public nuisance, etc. Just as plaintiffs have sought injunctive relief in the instant case, the plaintiffs in *Penelas* sought injunctive relief in addition to money damages. In part, they sought the issuance of an injunction that would require certain firearms manufacturers and retailers "to implement life-saving features into their products, and to alter the method of firearm distribution and sale so as to better keep firearms out of criminal circulation." *Id.* at 1044. All the claims were dismissed, and certain conclusions of the appellate court are highly instructive.

First, as to negligence, the Court of Appeal of Florida for the Third Circuit quickly rejected the whole negligence theory, for a reason that is much like the application of *Delahanty* in our own jurisdiction. In Florida, there was already an appellate ruling that precluded the filing of a decedent's lawsuit against the seller, manufacturer, etc. of a weapon known as a "riot and combat" shotgun.

The appellate court determined that no negligence claim could be maintained, in part because

> neither the manufacturer nor distributor had a duty to prevent the sale of handguns to persons who are likely to cause harm to the public [and that] there was no duty which had been breached by the manufacturer and distributor so as to support a cause of action based on negligence.

Trespalacios v. Valor Corp. of Fla., 486 So.2d 649, 651 (Fla. Dist. Ct. App. 1986).

The appellate court in *Penelas* rejected the viability of any public nuisance claim, for the same reasons articulated by this Court herein. *See* discussion of Count III *infra*.

In *City of Philadelphia v. Beretta,* the United States Court of Appeals for the Third Circuit affirmed the dismissal of a lawsuit in which the municipality sued various gun manufacturers for costs incurred from criminal use of handguns. Much like the allegations in the instant Complaint, the contentions of the plaintiffs in *City of Philadelphia* were that fourteen out-of-state gun manufacturers, though in compliance with federal and state laws, allowed guns to fall into the hands of criminals and children, contributing to criminal use within that city. *City of Philadelphia, supra,* at 419. The theories of liability in that case were negligence, negligent entrustment, and public nuisance.

As to the common law theories, the Third Circuit found that under Pennsylvania law there is no common law duty of the manufacturer of a non-defective firearm to control the distribution of that product to the general public. Moreover, there is no common law duty of a "remote vender" for marketing its product to people who arguably should have been known to the vendor as those who would mis-use the product. *Id.* at 425, citing *Mazillo v. Banks,* No. 3742-C of 1984, 1987 WL 754879, at *2 (Pa. Ct. Com. Pl. Feb. 6, 1987), *aff'd,* 373 Pa. Super. 646, 536 A.2d 833 (Pa. Super. Ct. 1987).

The Third Circuit also recognized that in Pennsylvania, a defendant has no duty to control the misconduct of third parties. *Id.* at 426, 536 A.2d 833, citing *Camden County Bd. of Chosen Freeholders v. Beretta,* 273 F.3d 536, 541 (3d Cir. 2001) (hereinafter "Camden County").[12]

This Court has looked closely at one particular appellate case cited by the plaintiffs in their attempt to illustrate that there is a duty existing between defendants and plaintiffs in the case before this Court. The opinion is that of the Supreme Court of Ohio in *City of Cincinnati v. Beretta U.S.A. Corp.,* 95 Ohio St. 3d 416, 768 N.E.2d 1136 (Ohio 2002) (hereinafter *"City of Cincinnati"*). That case deserves detailed scrutiny, not only on the issue of the existence of a common law duty, but also on the issue of whether plaintiffs' injuries are so remote from defendants' activities that the plaintiffs lack standing to sue. See further discussion, *infra,* as to the remoteness issue.

In *City of Cincinnati,* the allegations made by the municipality were virtually the same as those asserted by the District of Columbia. The city's Complaint was filed against 15 handgun manufacturers, three trade associations, and one handgun distributor. The theories of liability alleged included nuisance, negligence, and product liability, among others. The Supreme Court of Ohio summarized the key allegations:

> The gist of the complaint is that appellees have manufactured, marketed, and distributed their firearms in ways that ensure the wide-

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[12] This case is also cited herein in this Court's discussion of the allegation of "public nuisance." The Circuit's analysis of the remoteness problem is also valuable and is cited elsewhere herein, *infra.*

> spread accessibility of the firearms to prohibited users, including children and criminals. Thus, the complaint asserts, due to their intentional and negligent conduct and their failure to make guns safer, appellees have fostered the criminal misuse of firearms, helped sustain the illegal firearms market in Cincinnati, and have created a public nuisance. In its complaint, appellant sought both injunctive relief and monetary damages, including reimbursement for expenses such as increased police, emergency, health, and corrections costs.

Id. at 1140.

The trial court granted the defendants' Motion to Dismiss, pursuant to the local analog of Rule 12(b)(6), and the dismissal was upheld by the Court of Appeals for Hamilton County, Ohio. The Supreme Court of Ohio examined each of the three causes of action before them: public nuisance, negligence, and product liability. Reversing the intermediate appellate court, the Supreme Court of Ohio concluded that all three causes of action had been pleaded with requisite sufficiency in the Complaint.

The premise for reversing the dismissal of the negligence claim was a strained instance of discarding well established common law with no discernable explanation for doing so. The plaintiffs deserve to know why this Court cannot rely upon it. In this Court's view, the Ohio Court's opinion rests on an unexplained conclusion.

The Supreme Court of Ohio, while acknowledging that the common law requires the existence of a duty to the plaintiff by the particular defendant, inexplicably declared that the issue of duty somehow was not relevant. The Court of Appeals had relied upon longstanding case law that imposed the requirement of a special relationship between a plaintiff and a defendant in order to find a legal duty. The principal cases

were *Gelbman v. Second National Bank of Warren,* 9 Ohio St. 3d 77, 458 N.E.2d 1262 (Ohio 1984) and *Simpson v. Big Bear Stores Co.,* 73 Ohio St. 3d 130, 652 N.E.2d 702 (Ohio 1995). Nonetheless, the Supreme Court of Ohio stated:

> The court of appeals misconstrued the nature of appellant's negligence claims and erred in relying on the above authorities to dismiss those claims for lack of duty. In both *Gelbman* and *Simpson,* the issue before this court was whether, based on their status as property owners, the defendants owed a duty to protect persons such as business invitees from negligence or criminal acts of third parties that occur outside the owner's property and beyond the owner's control. In contrast, the negligence issue before us is not whether appellees owe appellant a duty to control the conduct of third parties. Instead, the issue is whether appellees are themselves negligent by manufacturing, marketing, and distributing firearms in a way that creates an illegal firearms market that results in foreseeable injury. Consequently, the 'special relationship' rule is not determinative of the issue presented here. Instead, the allegations of the complaint are to be addressed without resort to that rule.

Id. at 1144, 652 N.E.2d 702.

The above-quoted passage is the Court's entire explanation as to why the negligence count should have survived dismissal. Yet, it reveals no justification as to why the "special relationship rule" suddenly is not relevant to particular defendants in the firearms industry. The reasoning in the above-quoted opinion, at best, only raises more questions than it answers. It is completely discordant with *Gelman* and

Simpson while leaving those holdings intact. It creates doubt and confusion where clarity should reign.

As a practical matter, there is no real difference between a duty to prevent harm to a plaintiff and duty to avoid conduct that causes the same harm. These are all iterations of the same thing. Even where negligence has occurred, there can be no liability in the absence of a duty that, in turn, is founded upon a special relationship between plaintiff and defendant. This is exactly why the clear lack of a legal duty should preclude the wasteful process of attempting to prove that the defendant in question was engaging in negligent conduct. Remoteness generally means that a putative plaintiff is too far along a chain of alleged causation to be one to whom a duty is owed and whose injury is foreseeable. It is a doctrine designed to limit liability.

The Ohio opinion is an elegant example of ignoring that "a duty and the corresponding liability it imposes do *not* rise from mere foreseeability of the harm." *Hamilton v. Beretta, supra,* at 1062 (emphasis in original). The decision in *City of Cincinnati* is an aberration from the mainstream of jurisprudence on this important subject.

This Court is independently convinced that the content of the Complaint herein, on its face, does not sufficiently allege a legal duty of these defendants towards any of the plaintiffs.

2. Remoteness and Lack of Legally Sufficient Pleadings. Defendants assert that the conduct described in the Complaint is based upon factual transactions inherently so remote from the injuries inside the District that the plaintiffs cannot establish any act or failure to act of the defendants as a proximate cause of their respective injuries. This is a different way of articulating a problem that is recognized by another name, *i.e.* lack of standing. Without having standing to sue, there is no set of facts under which the plaintiffs can establish liability as a matter of law.

The most helpful and relevant case from another jurisdictions is *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 780 A.2d 98 (Conn. 2001), involving a lawsuit very similar to this case. Within the District of Columbia, a recent decision from the United States Court of Appeals for the District of Columbia Circuit reaches the same conclusion on the "remoteness" issue. That decision is found in *Service Employees International Union Health and Welfare Fund v. Philip Morris, Inc.*, 346 U.S. App. D.C. 74, 249 F.3d 1068, *cert. denied,* 534 U.S. 994 (2001) (hereinafter "Service Employees"). Although it relates to the tobacco industry rather than the firearms industry, the reasoning in *Service Employees* is instructive and can be applied with equal force to suits against either industry. These cases deserve great weight. However, to gain the benefit of these two cases, it is essential to recapitulate a useful definition of the remoteness issue, as it relates to the sufficient pleading of a cause of action. The Supreme Court of the United States provides such a definition in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992).

In *Holmes,* the Supreme Court held that the doctrine of remoteness provides that "a plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Id.* at 268-69. The problem of remoteness is related to the issue of whether a plaintiff can ever establish proximate cause (which is a fundamental element of any common law negligence claim). The Supreme Court has emphasized that "proximate cause" is a generic label for "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Id.* at 268 (citations omitted). "Accordingly, among the many shapes this concept took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id.*

The United States Court of Appeals for the Third Circuit has observed,

> Remoteness is analyzed through the following six factors: (1) the causal connection between the defendant's wrongdoing and the plaintiff's harm; (2) the specific intent of the defendant to harm the plaintiff; (3) the nature of the plaintiff's alleged injury and whether it relates to the purposes of tort law; (4) whether the claim for damages is highly speculative; (5) the directness or indirectness of the alleged injury; and (6) the aim of keeping the scope of complex trials within judicially manageable limits, i.e., avoiding the risks of duplicative recoveries and the danger of complex apportionment.

City of Philadelphia, *supra*, at 423.

In *City of Philadelphia* and *Ganim,* allegations of the kind contained in the instant Complaint were found to be clearly and fatally remote. The disposition in *Service Employees* illustrates a similar defect in the pleading of the same kinds of allegations against companies in the tobacco industry.

In *City of Philadelphia,* where there were also individual plaintiffs, the Third Circuit found that the District Court had correctly and justifiably identified the very same kinds of remoteness defects that this Court finds are present in the instant Complaint. The Circuit stated,

> In its analysis, the district court examined the route a gun takes from the manufacturer to Philadelphia streets, finding it 'long and tortuous.' First, the defendant manufacturers sell guns to licensees; second, the licensees sell the guns to dealers; third, the dealer sells it to

> a lawful purchaser acting as a straw buyer; fourth, the straw buyer transfers the weapon to a criminal or a youth; fifth, the transferee uses the gun to commit a crime, or the youth injures himself or a companion; and finally, demand on the City's or the organizational plaintiffs' resources is increased.

Id. at 423 (citation omitted).

The appellate panel added, "the straw's dealings are not with the manufacturers. Moreover, straw purchases are not the only means by which guns allegedly reach the 'illegal market,' and the chain is likely much longer and more varied." *Id.* at 424 (footnote omitted).

The United States District Court in *City of Philadelphia* had observed that the plaintiffs (like those herein) did not claim that the gun manufacturers intended to inflict injury upon the citizens, but that, at most, "they allege awareness of the means by which prohibited purchasers end up possessing handguns." *Id.*

One of the contentions of the plaintiffs herein is that the defendants should be on notice of illegal use of their weapons because of "trace requests." However, the United States Court of Appeals noted that "trace request information does not inform law enforcement agencies that a particular licensed distributor or dealer has committed an illegal act. Consequently, the trace request information does not put a gun manufacturer on notice that a specific distributor or dealer is engaged in unlawful firearm trafficking." *Id.* at n. 14.

With regard to the speculative nature of damages, and its relation to remoteness, this Court is convinced, as was the Third Circuit in *City of Philadelphia,* that plaintiffs' damages are speculative because "it would be difficult to calculate how many incidents could have been avoided had the [defen-

dants] adopted different policies. Moreover, as the district court noted, 'for each individual injury, independent factors obviously come into play, such as criminal conduct, drug or alcohol abuse, or other misconduct by the owner.'" *Id.* at 425, quoting *City of Philadelphia v. Beretta, U.S.A. Corp.*, 126 F. Supp. 2d 882, 905 (E.D. Pa. 2000) (citation and internal quotations omitted).

Finally, another remoteness factor in *City of Philadelphia* is just as compelling in the instant case: plaintiffs do not purport to be able to link a particular defendant with specific injuries or municipal costs. Since the plaintiffs seek to hold all defendants liable in gross, "any effort to compensate plaintiffs would require the expenditure of enormous judicial resources to determine which defendants should bear what percentage of liability." *Id.*[13] In the present case, it is fair to say that the Superior Court of the District of Columbia has no greater resources than the local federal court in the Eastern District of Pennsylvania. The plaintiffs have said nothing to raise a challenge to this particular factor. Indeed, they ignore it.

The treatment of the remoteness/standing issue by the Courts in deciding *Ganim* and *Service Employees* is equally instructive.

In *Ganim,* the plaintiffs were not individual citizens, but rather the Mayor of the City of Bridgeport (Joseph Ganim) and the municipality itself. They sued various firearms manufacturers, trade associations, and retail sellers. The plaintiffs sought injunctive relief as well as money damages

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[13] This point is also relevant to the analysis of the plaintiff's theory of determining and apportioning damages, as pleaded in Count V (collective liability). See further discussion, *infra* in text, as to Count V.

for expenses of police services, emergency services, police pension benefits, health care, social services, etc. *Ganim, supra,* 780 A.2d at 108. The Supreme Court of Connecticut affirmed the dismissal of the entire lawsuit, for lack of standing.

While some of the claims in *Ganim* are not included in the instant Complaint (such as negligent design of weapons), many of the *Ganim* claims were similar to those at hand. For example, they included an allegation that the defendants had sold large numbers of handguns to individual buyers, and permitted "straw" purchases when they knew or should have known that the handguns were intended for an unauthorized user." *Id.* at 111. They linked such sales to "a significant source of handguns used for criminal activity in Bridgeport." *Id.* They alleged that the manufacturers "are aware of the retailers' irresponsible and illegal conduct, and have not taken sufficient measures, if any, to prevent it." *Id.* The Court will not pause further to repeat the details of all the allegations in the Complaint. It suffices to say that the lawsuit was of the same, basic nature at the Complaint herein.

The basis for the dismissal clearly was the lack of standing, due to the remoteness of the claims. The Supreme Court of Connecticut focused on applying the *Holmes* factors to the types of claims in the instant case. It cited a good, three-part synthesis of the *Holmes* factors, articulated more recently by the United States Court of Appeals for the Second Circuit in *Laborers Local 17 Health & Benefit Fund v. Phillip Morris, Inc.,* 191 F.3d 229 (2nd Cir. 1999), *cert. denied,* 428 U.S. 1080 (2000) (hereinafter "Laborers Local 17".) Those three elements are summarized as follows.

> The more indirect an injury is, the more difficult it becomes to determine the amount of plaintiff's damages attributable to the wrongdoing as opposed to other, independent factors. Second, recognizing claims by the indi-

> rectly injured would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries. Third, struggling with the first two problems is unnecessary where there are directly injured parties who can remedy the harm without these attendant problems.

Id. at 236-37.

As to the first factor, the Supreme Court of Connecticut was constrained to note the obvious as to the inherent indirectness of the claimed injuries. It stated:

> It cannot be denied that factors other than the defendants' manufacture, advertisement, distribution and retail sales of guns contribute in significant measure to the various harms claimed by the plaintiffs. The scourge of illegal drugs, poverty, illiteracy, inadequacies in the public educational system, the birth rates of unmarried teenagers, the disintegration of family relationships, the decades long trend of the middle class moving from city to suburb, the decades long movement of industry from the northeast 'rust belt' to the south and southwest, the swings of the national and state economies, the upward track of health costs generally, both at a state and national level, unemployment, and even the construction of the national interstate highway system, to name a few, reasonably may be regarded as contributing to ... [the city's] quality of urban life.

Ganim, *supra*, at 124.

Except for the reference to the "rust belt," the societal ills described above are found just as readily in the District of Columbia.

As to the second element, *i.e.* the virtual impossibility of fairly apportioning damages, the Court observed that the whole process of apportionment "would present a daunting question to any court." *Id.* at 126. Furthermore, in suits that might be filed by other potential individual plaintiffs such as homeowners or families of those injured by gunfire, "the defendants would be entitled to assert various special defenses, based on those plaintiffs' conduct, which would not be available to the defendants in the present action. Thus, failing to recognize the derivative nature of the present action could unfairly deprive the defendants of those defenses." *Id.* at 126. In the instant case, as brought by the District, this creates a natural tension between a suit brought by the municipality and yet-unfiled lawsuits by individuals.

The third factor illuminates an interesting issue emerging from the impact of gun violence. The Supreme Court of Connecticut noted the argument of the plaintiffs that "they have standing because there are instances where the injuries for which they seek redress occur even without an individual victim, for example, where they incur the costs of detection, investigation, arrest and social services 'handling cases of unlawful gun possession in which not a single shot is fired.' We are not persuaded." *Id.* at 127.

The Court in *Ganim* was not persuaded because it plainly recognized that the true impetus for filing the Complaint was the enormity of countless killings and negative impact on the lifestyles of children, as alleged in Bridgeport's Complaint.

In *Services Employees,* the United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal of a suit by certain institutional plaintiffs against various tobacco companies. In that case, the defendants were

sued by several "labor-management health trust funds" (hereinafter "funds"). They were joined by a number of sovereign nations such as Guatamala, based upon the costs that they incurred to fund health care for their citizens.

The United States District Court had dismissed the claims of the nations, concluding that "the 'tortured path' from the defendants' alleged wrongdoing to the nations' increased expenditures 'demonstrates that [the nations'] claims are precisely the type of indirect claims that the proximate cause requirement is intended to weed out.'" *Service Employees, supra,* at 76, 249 F.3d at 1071, quoting *Republic of Guatamala v. Tobacco Inst., Inc.,* 83 F. Supp. 2d 125, 130 (D.D.C. 1999). However, the United States District Court denied the motion to dismiss filed against the funds. On appeal, the dismissal against the nations was affirmed and the denial of the motion to dismiss as to the funds was reversed.

Specifically addressing what should have been a dismissal of the claims brought by the funds, the Court of Appeals found that "the harms alleged by the funds and the nations are too remote from the defendants' alleged wrongdoing to provide antitrust or RICO standing. Neither the funds nor the nations have shown that their claimed economic harms were not caused by other independent factors or that difficult problems of duplicative recoveries or allocation of damages could be avoided were they allowed to proceed." *Id.* at 81, 249 F.3d at 1074. The *Holmes* factors were cited and explained in the context of tobacco use. Moreover, the panel noted that since the claims did not set forth facts from which proximate cause could be articulated, any local common law claims must fail as well as the federal statutory claims. *Id.* at 83, 239 F.3d at 1076.

Even though the suit by the funds was manifestly not a subrogation action, the District of Columbia Circuit concluded that no claim had been sufficiently pleaded as a so-called "infrastructure" harm. The Court reasoned that any

"harm arising from payment of medical expenses by the funds and the nations is itself derivative of alleged injuries to individual smokers." *Id.* at 81, 249 F.3d at 1074. This concept certainly applies to the District's claim herein.

While the present litigation has unfolded, the number of federal circuits rejecting similar suits against tobacco companies has increased. *See Lyons v. Philip Morris, Inc.*, 225 F.3d 909 (8th Cir. 2000); *United Food & Commercial Workers Unions v. Philip Morris, Inc.*, 223 F.3d 1271 (11th Cir. 2000). Those lawsuits failed also because of the remoteness problem. This was the identical fate of a tobacco lawsuit dismissed by the Hon. Steffen W. Graae in the Superior Court of the District of Columbia. *See Obra Social de Empleados de la Marina Mercante, et al. v. American Tobacco Co., Inc., et al.*, Civil Action No. 00-1790 (D.C. Super Ct. Jan. 2, 2001).

Finally, with respect to the negligence claims of the individual plaintiffs in the instant case, there is no need to expound at length on the problem of lack of proximate cause. Not one of the individual plaintiffs has stated his or her claim in such a way as to identify a particular defendant as being responsible for his or her injury or death. No plaintiff can prevail in a lawsuit against a group of defendants by essentially throwing a dart at the group and never making an assertion that any one of them was connected to the injury.

The relevant case law that governs the role of proximate cause is more than enough to compel the dismissal of the claims as to common law negligence as to all plaintiffs and all defendants.

Count III: Common Law Public Nuisance

Count III of the Complaint is brought solely by the District of Columbia. The District demands damages from all the defendants under a theory that they have created a "public nuisance."

Fundamentally, defendants argue that they are entitled to a judgment in their favor at this early stage of the litigation because the nuisance claim, on its face, does not fall within any of the established categories of tortious conduct that are recognized in this jurisdiction as a "public nuisance."

The District of Columbia Court of Appeals has synthesized the basic difference between a private nuisance and a public nuisance.

> A *public nuisance* is an unreasonable interference with a right common to the general public. At common law, the term 'public nuisance' covered a variety of *minor* criminal offenses that interfered, for example, with the public health, safety, morals, peace, or convenience....
>
> In contrast, a private nuisance is a substantial and unreasonable interference with private use and enjoyment of one's land, for example, by interfering with the physical condition of the land, disturbing the comfort of its occupants, or threatening future injury or disturbance. Historically, the origin of private nuisance liability 'was purely tortious in character,' not criminal; and the tort was developed, as needed, to protect use and enjoyment of land against nontrespassory interference.

B & W Mgmt., Inc. v. Tasea Inv. Co., 451 A.2d 879, 881-882 (D.C. 1982) (emphasis added).

The historical genesis of "public nuisance" law is set forth in encyclopedic fashion in the familiar treatise known as the [Restatement (Second) Of Torts], § 821B, cmt. a (1979). In the treatise, the definition of common law public nuisance is consistent with the definition quoted in *B & W Management, Inc., supra.*

In the modern era, most jurisdictions have updated their recognition of this legal theory, to require it to conform to specific statutes. In one commentator's observation, the law of public nuisance simply "ha[d] become anachronistic" because it ran contrary to the values of precision and certainty. *Id.* cmt. c. The need for precision and certainty, in fixing liability and money damages, is utterly essential to fundamental fairness and the orderly litigation of economic disputes.

The abatement of public nuisances is firmly a creature of statute, and does not come from judicial fiat. In the District of Columbia, the legal authority for imposing the remedy of "abatement" of a public nuisance comes from only two sources: (1) the general Code provision that relates to the city's duty to ameliorate illegal conditions arising from real property; and (2) specific nuisance abatement language in criminal statutes, taxation statutes, or other explicit regulatory schemes. These statutes apply to many forms of "abatement" that may be carried out with respect to both real property and personal property. This lawsuit is about a claim for reimbursement of the costs of nuisance abatements. The notion of seeking "reimbursement" for the costs of abatement is actually quite limited, and this is reflected in the following description of the nuisance laws of the District.

First, the Executive Branch has responsibility for regulation and inspection of myriad uses of real property, where public health and safety are concerned. The Code provides a basic authorization to the Mayor "to correct any condition which exists on or has arisen from such property in violation of law or of any regulation made by authority of law, with the correction of which condition said owner is by law or by said regulation chargeable...." D.C. Code § 6-711.01(a) (2001) [redesignated as D.C. Code § 42-3131.01(a) (2002)]. The reference to "such property" specifically means "real property in the District of Columbia." *Id.*

Where it is necessary for the Mayor to take action to eliminate the particular nuisance, the Mayor is authorized to do so and to "assess the fair market value of the correction of the condition or the actual cost of the correction, whichever is higher, and all expenses incident thereto ... as a tax against the property ..." *Id.* Thus, the Code envisions that the way for the District to obtain "reimbursement" for the cost of such abatement is through taxation, not lawsuits for money damages.

The Court of Appeals has ruled that the same statute provides authority to the Mayor to enforce compliance with valid regulatory orders that are not necessarily reflective of a traditionally defined "public nuisance," but which violate discrete legal requirements or which breach clear legal authority to engage in certain activity. *Auger v. Board of Appeals & Review,* 477 A.2d 196, 211 (D.C. 1984). This would include, for example, a property owner's refusal to remove a sign after a sign permit has been revoked. *Id.*

Certain statutes are directed towards activity that the Legislative Branch has deemed specifically to be a public nuisance. The best example is the use of real property for offensive and illicit sexual activity for commercial purposes, *e.g.*, operating a so-called "bawdy house." Indeed, the Court of Appeals has commented that the bawdy house statute captures the essence of a "nuisance per se." *Raleigh v. United States,* 351 A.2d, 510, 514 (D.C. 1976).

Secondly, there are myriad other criminal and regulatory laws that give the Mayor authority to engage in the abatement of illegal activity, including forfeiture of money and forfeiture of a broad range of personal property. Some examples are: (1) authorization to the Mayor to file actions for "libel" to obtain forfeiture of fixtures and furniture and the like where a property owner is operating a "gambling premises" (D.C. Code § 22-1705(c) (2001)); (2) seizure of alcoholic beverages where they are illegally sold or consumed

(D.C. Code § 25-803 (2001)); (3) confiscation of motor vehicle fuels where applicable taxes have not been paid (D.C. Code § 47-2320(b) (2001)). Where abatement of illegal activity relates to personal property rather than realty, the same geographic stricture is invoked, *i.e.* the affected personalty and the offending activity must be found *within* the District of Columbia.

One principle is crystal clear: all provisions of the Code described above set forth a specific delineation of the police powers of the Mayor with respect to public nuisances that affect the health and safety of the citizens. These police power statutes plainly do not authorize the Mayor to abate nuisances or illegal activity that is occurring outside the geographical boundaries of the District of Columbia. Yet, in seeking "reimbursement" damages, this is precisely what the plaintiffs presume can be ordered by the Superior Court. They are wrong. This is a glaring flaw in Count III of the Complaint. Moreover, the territorial limitation on the Mayor's police powers is a factor that obviously dovetails into the Commerce Clause problem that infects the Assault Weapons Strict Liability Act. See further discussion, *infra,* as to the constitutional problems in the Strict Liability Act.

Interestingly, the Strict Liability Act does not in any fashion authorize the Mayor to engage in any seizures, forfeitures or other forms of abatement activity (whether or not such matters might be attempted inside or outside the District). Furthermore, the Act does not provide for any type of injunctive relief. The only relief authorized by the Act is money damages. Thus, the Strict Liability Act clearly cannot be a basis for suits for reimbursement of abatement expenses.

The common law of the District of Columbia has never permitted judicial orders of abatement to be formulated or concocted by judges on an *ad hoc* basis, in the absence of a statute that expressly grants such authority to the courts. In opposing the instant Motion for Judgment on the Pleadings,

the plaintiffs have not pointed to any statute that contains authority to sue based on the alleged public nuisance described in the Complaint. None exists.

To summarize, the action for "public nuisance" as alleged by the District is not sustainable as a matter of law, for several reasons.

First, it is not based upon conduct of the defendants that violates any criminal law of the District of Columbia. The District readily acknowledges that none of the extraterritorial operations of the defendant companies constitute criminal conduct.

Second, none of the defendants' conduct violates any municipal regulation or health and safety law of the District of Columbia (such as the tax laws, zoning regulations, or anything else). There is, for example, no allegation in the Complaint that the defendants have violated any law that regulates the use of real property or personal property within the District of Columbia. This is conceded. Consequently, this Count of the Complaint presents no cause of action for "abatement" that could be founded upon any regulatory statute.

Third, the whole notion of demanding damages in the form of reimbursement for the cost of "abatement" work is legally groundless. The District should have known this when it filed the Complaint, because it is so obvious that the Mayor and his subordinates have no police powers that would enable them to engage in any "abatement" efforts outside of the District of Columbia. The District would never incur any costs of "abating" the organization of gun shows in Wyoming or inspecting or shutting down retail outlets in Virginia, for example. The suggestion in Count III that there is actually some form of "abatement" that can be executed by the District outside this city is totally illusory. For this reason, no damages for reimbursement for "abatement" could ever be part of any judgment against the defendants.

The United States Court of Appeals for the Third Circuit has rendered thoughtful opinions that identify the practicalities of why the lawful activities of these defendants cannot be properly categorized as a public nuisance. Those opinions emerge in *Camden County, supra,* and *City of Philadelphia, supra.*

The key point in both cases is that the defendants do not have control over the criminals who used or misused their products. Having some recognizable ability to control the alleged nuisance is an essential element to a suit for abatement. Affirming the dismissal of a lawsuit much like this one, the Third Circuit wrote,

> The county makes no allegation that any manufacturer violated any federal or state statute or regulation governing the manufacture and distribution of firearms, and no direct link is alleged between any manufacturer and any specific criminal act.... Whatever the precise scope of public nuisance law in New Jersey may be, no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce. On the contrary, the courts have enforced the boundary between the well-developed body of product liability law and public nuisance law. Otherwise, if public nuisance law were permitted to encompass product liability, nuisance law 'would become a monster that would devour in one gulp the entire law of tort.'

Camden County, supra, at 539-540, quoting *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

In *Camden County,* the panel observed the nub of the problem in pleading the claim. Referring to the chain between the defendants and victims of crime, it noted,

> This causal chain is simply too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim.... The manufacturers may not be held responsible 'without a more tangible showing that the defendants were a direct link [in] [*sic*] the causal chain that resulted in the plaintiffs' injuries, and that the defendants were realistically in a position to prevent the wrongs.'

Camden County, supra, at 541, quoting *Hamilton v. Beretta U.S.A. Corp., supra* 727 N.Y.S.2d 7, 750 N.E.2d at 1062. Recognizing that the real cause of the "nuisance" is individual street crime rather than the lawful activities of the defendants, the Third Circuit emphasized, "If independent third parties cause the nuisance, parties that have not controlled or created the nuisance are not liable." *Camden County, supra,* at 541.

In *City of Philadelphia,* a case nearly identical to the instant lawsuit, the Complaint had been dismissed for failure to sufficiently plead a similar public nuisance claim and other claims. That dismissal was affirmed as well, relying on the precedent and reasoning of *Camden County.*

In other jurisdictions, public nuisance suits against the gun industry have failed as well, for reasons similar to those articulated in *Camden County.* This was the result, for example, in *Penelas v. Arms Technology, Inc.,* 778 So.2d 1042 (Fla. App. 2001).

This Court has carefully reviewed the cases cited by the plaintiffs in support of their nuisance claim. They are not an effective answer to the principles that undergird *Camden County* and other authorities. For example, the denial of a

motion to dismiss a public nuisance claim was affirmed in *Young v. Bryco Arms,* 327 Ill. App. 3d 948, 262 Ill. Dec. 175, 765 N.E.2d 1 (Ill. App. 2001). That case, too, was a suit against companies such as the defendants herein, alleging public nuisance and other causes of action. The affirmance is of no relevance to the instant case, because it was completely idiosyncratic to an Illinois statute.

In *Young,* the plaintiffs complained that they were authorized to file suit to vindicate their "public right to use the streets and other public places within the City of Chicago without fear, apprehension and undue risk of injury to themselves or to their families." *Id.* at 4. The Illinois appellate court decided that the allegation had been pleaded sufficiently only because of an 1888 case that found an actionable right flowing from a "village ordinance [that] declared public picnics and open air dances to be a public nuisance." *Id.* at 18. These kinds of gatherings of juveniles had been the sites of drive-by shootings that were described in the Complaint. Under these highly unique circumstances, the pleading was found to be legally sufficient. There is no such case law in the District of Columbia. Thus, this particular case is not instructive at all.

Finally, giving the Complaint the broadest possible reading, it may be that the District simply misuses the term "abatement" to signify an attempt to obtain compensatory damages for the City's "costs" arising from the alleged nuisance (costs such as those associated with maintaining police and fire protection, for example). If so, this is no more than an improper attempt to obtain money under the rubric of the health-care and personnel statutes without complying with the requirements of pleading such claims. Since this Court finds elsewhere herein that the District's Complaint does not state a claim that facially satisfies those requirements as to the subrogated claims, the District cannot do indirectly (through the nuisance claim) what it cannot do directly.

Count I: The Strict Liability Act and the Specific Claims for Damages

Defendants seek a judgment on the pleadings with respect to Count I, for reasons that are entirely separate from the constitutional challenge as such. First, the defendants argue that the individual plaintiffs have insufficiently pleaded their claims. Secondly, the defendants assert that the District is not authorized by law to file its own claims for damages under this particular statute. The Court addresses both arguments separately as follows.

1. *The Individual Claim of Lawson.* This particular plaintiff asserts that as a result of gunshot wounds he was severely injured and that he suffers permanent disabilities. He alleges that he was shot and paralyzed in Northeast Washington, D.C. on January 26, 1997 and that two persons eventually entered guilty pleas in connection with this incident. Complaint at ¶¶ 43, 45. He required surgery in January of 1997 and in April of 1997. Complaint at ¶ 46. He further alleges,

> During surgery for his injuries, two bullets were recovered from Plaintiff Lawson; the bullets were determined to be *either .380 or 9 millimeter caliber.* These bullets *most likely* were fired by a 'machine gun,' as defined by the Strict Liability Act, which was manufactured, imported, or sold by one of the Defendants.

Complaint at ¶ 47 (emphasis added).

The defendants argue that Lawson's claim, as it is worded, fails to articulate a claim against any one of the defendants. Defendants essentially argue that it is so vague that it could not support a judgment against any one defendant, even if the claim is true on its face.

The Court concludes as a matter of law that Lawson's claim is not legally sufficient on its face. This is so for several reasons (some of which apply to the other individual plaintiffs as well). First, since the injuries to this plaintiff occurred so long ago, there is no excuse for his inability to assert which defendant's weapon was used to harm him, if this fact is knowable at all. Surely, the defendants would not know this information, and it would not be revealed in discovery. *See* further discussion, *infra,* as to discovery. Secondly, Lawson fails to allege that he was injured by the discharge of a named weapon that is actually covered by the Strict Liability Act.

The Court has considered the arguments tendered by Lawson and the District as to why Lawson's claim should withstand the instant Motion for Judgment on the Pleadings. Those arguments have no merit.

The plaintiffs make no secret of the fact that Lawson is unable to identify the weapon that was used to injure him, that the weapon was never recovered, and that he is unable to identify which of the named defendants manufactured, imported or sold such weapon. In other words, Lawson's claim, as it is pleaded, does not connect his injuries to any particular defendant and does not allege that he was injured by a gun made, imported, or distributed by any one of them. If he had sued only one defendant, it is clear that he could not obtain a judgment against that entity without identifying allegations. Therefore, his pleaded claim is not made legally sufficient merely because it is magnified by a larger number of defendants whose actual connection to the shooting is equally unstated in the Complaint.

The inherent and glaring flaw in Lawson's allegation is that he and the District, *not the defendants,* are in the best position to identify the relevant weapon and the particular defendant whose product was involved, if such facts can be ascertained. Lawson has simply failed to plead his claim so

as to draw a simple link between his injuries and a weapon banned under the Strict Liability Act. This is crucial to establishing liability.

The defendants cite an opinion from the District of Columbia Court of Appeals holding that common law tort principles do require a plaintiff to plead a causal link between an identifiable product and an identifiable defendant. *Bly v. Tri-Continental Indus., Inc.*, 663 A.2d 1232, 1237 (D.C. 1995). The Strict Liability Act, while eliminating the concept of "fault" from the analysis, does not in any way eliminate a plaintiff's obligation to be specific about the identity of the firearm and the identity of the manufacturer, importer, or seller who is responsible for the particular weapon.

Interestingly, the invocation of the Strict Liability Act not only requires a plaintiff to specify that the weapon involved was one covered by the Act, but that this particular weapon was manufactured, distributed, or imported by a company that is actually one of the named defendants. The plaintiffs do not contend that these defendants are the only possible sources of those weapons banned under the Act.

If anything, the whole point of invoking strict liability is to hold liable those entities whose temporal (*i.e.* timely and physical) connection to the injury is not really open to question. Strict liability, exactly as the phrase implies, is founded upon strict pleading, not conjecture or mere generalities.

Without being able to name a specific weapon that was used, it is, by definition, impossible for Lawson to show that the relevant weapon was one covered by the Act itself. For this reason, Lawson's claim must fail as a matter of law.

The decision in *Bly* deserves further comment. In *Bly*, the Personal Representatives of several deceased persons sued various manufacturers and suppliers of gasoline, alleging negligence, strict liability and other causes of action. They sought to make those defendants legally responsible for

the deaths of the decedents from leukemia, which they asserted was contracted from exposure to benzene contained in gasoline. *Id.* at 1234. The defendants in *Bly* had filed Motions for Summary Judgment and Motions to Dismiss. *Id.* at 1235. All defense motions were granted, and all such rulings were affirmed by the Court of Appeals.

The principal issues on appeal in *Bly* were (1) whether the trial court had erred in granting judgment for the defendants whose connection to the gasoline exposure concededly could never be proven by the plaintiffs, and (2) whether the trial court erred in disallowing the use of an alternative theory of liability where it was impossible to identify the defendant whose product was responsible for the injury (the so-called "market share liability" theory). The Court of Appeals found that the allegations in *Bly* did not support the invocation of this "radical departure from traditional tort law principles...." *Id.* at 1234. See further discussion, *infra,* regarding "collective liability."

The plaintiffs in the instant case seek support from *Bly* because of suggestions therein to the fact that the parties had engaged in discovery before the critical lack of evidence had been confirmed. *Id.* at 1234-35. In *Bly,* the appellate court stated,

> After extensive identification discovery, appellants do not contend that they have any evidence that they were exposed to Marathon's products. Thus, dismissal was clearly appropriate under tort law principles which require proof that the product alleged to have caused a plaintiff's injury can be traced to the manufacturer.

Id. at 1242, citing *District of Columbia v. Freeman,* 477 A.2d 713, 716 (D.C. 1984); *Catrett v. Johns-Manville Sales Corp.,* 263 U.S. App. D.C. 399, 406, 826 F.2d 33, 40 (1987). Unlike what evolved in *Bly,* the instant case presents no need

for the parties to engage in discovery in order to "confirm" the lack of evidence.

The plaintiffs argue that "Mr. Lawson is entitled to discovery to identify the manufacturer of the gun with which he was shot and to determine with certainty that it was an "assault weapon" or "machine gun" covered by the Strict Liability Act. Opposition at 57. This quoted statement is an unmistakable admission that Lawson has failed to allege what kind of weapon was used to injure him or which defendant is associated with such a weapon. He (and the District) had no clue about this information when the Complaint was filed. Even after this issue was flagged to his attention by the instant Motion for Judgment on the Pleadings, Lawson has proffered nothing to cure the problem and has never sought to amend his allegation, so as to be more specific.

The troubling flaw in the plaintiffs' argument is that since no weapon was actually recovered in the Lawson shooting--a fact that is conceded in Lawson's reference to "probability"--there is no "discovery" from the defendants that will produce the necessary identifying information about the relevant weapon.

Ironically, when compared to the defendants, it is Lawson and the District of Columbia who have exclusive knowledge of whatever facts might reveal the identity of the weapon, and they still do not know such information. After all, the District of Columbia government includes the Metropolitan Police Department and all its professional contacts with law enforcement agencies. If that Department or any other law enforcement agency had actually recovered a weapon, the weapon could be compared to the ammunition that was recovered and the mystery might be solved (as the type of weapon, date of manufacture, etc.).

The defendants surely have no access to the weapons that were physically associated with the claims of Lawson and the District. The plaintiffs do not ever frivolously sug-

gest that the defendants could produce such evidence. Therefore, the reference to taking discovery is an empty statement, and it seeks to evade the real problem in this case: no deposition, interrogatory, etc. will produce the kind of information that the plaintiffs should have had in their possession before they filed this lawsuit.

On product identification and defendant identification, the factual record is already as highly developed as it will ever be as to Lawson's claim. This claim has been pleaded with as much specificity as it will ever have.

It is important to note also that neither the District nor Lawson has ever suggested that they could identify "the Lawson weapon" or its manufacturer based solely on the type of ammunition that was used in the shooting. They do not claim that the ammunition that was recovered is so unique that the mere recovery of such a bullet or shell casing could pinpoint its source (or the vintage of the source).

The problem of a failure to allege that any identified defendant was the source of the gun that injured the plaintiff is one that arises with respect to *all* the other individual claims in this case, including those embraced in the proposed Third Amended Complaint. No individual plaintiff purports to know (or purports to be able to find out) which particular weapon caused the injury or which defendant (if any) was its manufacturer or distributor. No amount of discovery from the defendants will improve the quality of the claims as they were pleaded in the Complaint, nor can such discovery yield proof of these claims. The plaintiffs have utterly failed to confront this very practical fact of life.

The claim by Lawson under the Act requires some kind of identifier of the "vintage" of the weapon, so as to place

Lawson's injury within the time coverage of the Act.[14] The plaintiffs already acknowledge in the Complaint that the only weapons covered by the Act are those that a defendant actually manufactured, imported or sold after one of two relevant dates. As Lawson's claim is pleaded, it does not assert that the weapon involved was manufactured, sold or distributed after the relevant effective dates of the Strict Liability Act and the statute that added the inclusion of machine guns. In the Complaint, the plaintiffs allege,

> Each of the defendants has manufactured, imported, or sold one or more assault weapons (as defined by the Strict Liability Act) *after February 29, 1992, the effective date of the Act,* or one or more machine guns (as defined by the Act) *after October 7, 1994, the date the Act became applicable to machine guns.* D.C. Code §§ 6-2391 to -2393. One or more of these assault weapons and machine guns have been discharged in the District, thereby causing deaths and bodily injuries.

Complaint at ¶ 75 (emphasis added).

Despite this sweeping, but preliminary kind of statement about what the defendants generally have done, Lawson stops short of actually saying that any statutorily enumerated assault weapon or machine gun of the relevant age of manufacture (or importing or sale) was used to injure him. The above-quoted statement is no more than a generalized allega-

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[14] Even without specifying the actual date itself, Lawson should at least state under oath in a Verified Complaint that the weapon used to injure him was in fact manufactured, imported or sold after the relevant effective date. He has failed to make this claim, even in a conclusory fashion.

tion that these defendants manufactured or distributed these kinds of weapons during these time periods, and that such weapons were discharged in the District thereby injuring unnamed persons. Even assuming that the quoted statement is true, it does not suffice as a properly pleaded claim for damages.

For example, Lawson does not allege that the particular weapon used to injure him was one of the enumerated "assault weapons" or that it was one manufactured, imported, or sold by one of the named defendants at some point after the effective date of February 29, 1992. Where machine guns are concerned, Lawson does not even hint at, much less specify, that he was shot with a machine gun of some kind rather than one of the specifically named assault weapons. Consequently, he fails to plead with requisite specificity that he was injured with a machine gun that was manufactured, imported or sold by one of the defendants at some time after the date of October 7, 1994.

The effective dates of the Act are so specific that any plaintiff has a clear obligation to plead facts that, on their face, would make the Act applicable. The statute itself provides the fundamental standard by which to measure the sufficiency of pleading. Neither Lawson nor the District attempts to explain this failure of pleading.

Plaintiffs' only other argument for the sufficiency of Lawson's claim is the sweeping statement that "Lawson is entitled to hold Defendants collectively liable for his injuries if the defendant that manufactured the gun used to shoot him cannot [be] specifically identified." Opposition at 55. This "collective liability" argument has no merit for the reasons set forth herein in more detail, *infra,* with respect to the Court's analysis of Count V.

2. Other Individual Claims. The Court's review of the other individual claims reveals that they all carry the very same kinds of defects that burden the claim of Lawson. For

the sake of brevity, the Court will not repeat the wording of their claims again. It suffices to say that the other individual plaintiffs likewise fail to identify which defendant and corresponding product was involved in their respective injury or death of the relevant decedent. They likewise fail to allege that the weapon involved was in fact manufactured after the effective date of the Strict Liability Act.

Because *none* of the individual plaintiffs bases his or her case on weapons that were actually recovered, their claims are pled on pure speculation. Mahoney, for example, can only say that the gun utilized was a machine gun "or" an assault weapon, and he certainly is unable to plead that the weapon (whatever it was) was manufactured, imported, etc. after the effective date of the Act. The same problem is found in the pleading of the Foster-els. Thus, they cannot establish any facts by which they can obtain a judgment against the defendants. To summarize, the Court's analysis of the deficiencies of the Lawson claim applies equally to the other individual plaintiffs and is incorporated herein by reference.

The claims of the individual plaintiffs added in the Third Amended Complaint also are legally insufficient. For example, the claims of Wallace and Marsh are based on conjecture. The best that they can articulate is, "On information and belief, the bullets that killed Wallace and Marsh were fired by a 'machine gun' or "assault weapon' as those terms are defined by the Strict Liability Act. The gun was manufactured, imported, or sold by Defendants." Third Amended Complaint at ¶ 87.

First, using the phrase "on information and belief" is really no different than Lawson's phrase that the bullets were "most likely" fired by a weapon covered by the Act. Second, these plaintiffs recite only in conclusory fashion that the gun was "manufactured, imported, or sold by Defendants." Yet, since the weapon that caused the deaths was not recovered,

by definition the plaintiffs cannot trace its year of manufacture, the date of import (if indeed it was made outside the United States), or the date of sale.

The claims of Ferguson, Vaughn, and Blue present a variation of the weapon identification problem previously considered with respect to Lawson's claim. While they state, in purely conclusory terms, that the weapon involved was explicitly an "AK-47," they fail to state that it was an AK-47 that was manufactured, imported or sold after the effective date of the Act. This is not nit picking, because legislation applies to a particular defendant only as of its effective date unless the Act itself contains a retroactivity clause. This statute contains no such clause. Thus, even if they had stated in the Third Amended Complaint that an eyewitness could testify that the weapon was an AK-47, this kind of visual recollection cannot account for the precise information that the plaintiffs would have to produce in order to establish a prima facie case.

3. The District's Claim.

The District of Columbia seeks monetary damages under the Strict Liability Act under two different approaches: (1) a totally independent claim of its own and (2) claims made pursuant to specific subrogation statutes, wherein other individuals are the actual victims of the allegedly tortious conduct. The defendants challenge the sufficiency of the claim, under every rubric used by the District.

The sufficiency of the pleading of the District's claim is attacked on several fronts. First and foremost, the defendants argue that the Strict Liability Act, by its own terms, is limited to civil actions that are to be filed by individuals. They stress that Act itself does not grant a separate right of action to the District.

Secondly, to the extent that the District seeks money damages for common law or equitable reasons under Count I,

the defendants cite well-established case law that precludes the District from filing such lawsuits for the broad purpose of "municipal cost recovery."

Third, the defendants contend that the pleading of a claim under color of the subrogation statutes is legally insufficient because the District has failed to allege adequate information about the underlying claims that belong to the individual persons who received the medical care or other benefits for the personal injuries. For example, the defendants cite the fact that the District's claim fails to identify the names of the persons who are the actual subrogors and further fails to recite the identity and vintage of the weapon so as to reveal why the incident is covered by the Strict Liability Act. There are other fatal flaws as well. See further discussion, *infra,* under "Count IV: Subrogated Claims Under Public Reimbursement Statutes."

Fourth, the defendants argue that the District's attempt to obtain reimbursement for systemic costs associated with generalized gun violence is not a legally cognizable claim under the Act, because not all "gun violence" is caused by the very specific weapons covered by the Strict Liability Act itself.

Two of the points noted above are examined further as follows.

No Separate Right of Action Under the Strict Liability Act. In the Complaint, the District alleges the following:

> Defendants are strictly liable to Plaintiff District for (1) health care costs and Medicaid expenses the District has incurred for care and treatment of victims of this gun violence and (2) costs of other assistance and compensation provided or paid by the District to police officers, firefighters, and other District employees who have suffered injuries from this gun violence, which costs are recoverable under Dis-

> trict statutes. D.C. Code §§ 1-624.31, 3-502, and 4-502. Defendants also are liable for *any other costs* incurred by the District that are recoverable by statute, in equity, or under common law.

Complaint at ¶ 78 (emphasis added).

Contending that the Act, by its terms, applies only to suits filed by individuals, defendants urge the Court to look first to the plain words of the Act. In pertinent part, the Act provides:

> Any manufacturer, importer or dealer of assault weapons and machine guns shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if *the bodily injury or death* proximately results from the discharge of the assault weapon or machine gun in the District ...
>
> This section shall not operate to limit in scope any cause of action, other than that provided by this subchapter, available to *a person injured* by an assault weapon.

D.C. Code §§ 6-2392, 6-2393(c) (emphasis added). The statute is totally devoid of any mention of a separate right to sue for the District of Columbia.

Aside from the facial lack of authority to sue, the defendants point out that the lack of a right to sue as a corporation is self-evident from the language specifying that the damages must be those that flow from personal injury, *i.e.* that the District is not a human being that can sustain such injuries.

To be sure, the Act's references to "bodily injury" and to "persons," are not ambiguous. Only an individual human being is a "person" who can experience bodily injury or

death. "The words of a statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *Peoples Drug Stores, Inc. v. District of Columbia,* 470 A.2d 751, 753 (D.C. 1983). Moreover, as the District of Columbia Court of Appeals has observed, "The text of an enactment is the primary source for determining its drafters' intent." *Stevenson v. District of Columbia Bd. Of Elections & Ethics,* 683 A.2d 1371, 1376 (D.C. 1996).

The words of the Act are so clear that it is not necessary for this Court to review the legislative history in order to determine whether the Council actually meant to create a right to sue only in individuals. *Id.* Nonetheless, the defendants have cited ample portions of the legislative history, wherein various members of the Council of the District of Columbia expressed a desire to provide a right to action to *individual* citizens. *See* Defendants' Memorandum in Support of Motion for Judgment on the Pleadings at 26. In response to the instant Motion, the plaintiffs cite no other legislative history to suggest in any way that the Council intended to enact a separate right of action for the District of Columbia under the Strict Liability Act. To avoid extending this opinion, the Court will not pause to recreate the legislative history of the Act.

The District struggles to explain the legal basis for filing its own lawsuit under the Strict Liability Act. In its Opposition to the Motion for Judgment on the Pleadings, the District states:

> The Strict Liability Act is a remedial statute. In construing an act with a broad remedial purpose, the District of Columbia courts give a liberal interpretation to the protective provisions of the act, while narrowly construing the exemptions and exceptions to the act. In this case, as a result of deaths and bodily injuries in the District of Columbia caused by Defen-

> dants' assault weapons and machine guns, the District had incurred direct and consequential damages, in the form of Medicaid *and other* health care costs; costs of *other assistance and compensation* provided or paid to police officers, firefighters, and other District employees; and others [sic] costs recoverable by statute, *in equity, or under common law. Accordingly, the District may bring a direct claim for relief under the Strict Liability Act.*

Opposition at 11 (emphasis added).

The second sentence in ¶ 78 of the Complaint is telling, when juxtaposed with the quoted arguments in the District's Opposition. In ¶ 78, the District alleges that defendants may be sued under the three health care statutes, but that defendants "also are liable for any other costs incurred by the District that are recoverable by statute, in equity or under common law." It is clear from the way this portion of the Complaint is worded that the District hinges its right to sue on two different theories: use of the subrogation statutes that are explicitly cited, as well as a vague concept of "equity" and "common law," as if such principles can alter and expand the provisions of a specific piece of legislation.

Illogically, the District attempts to blend two utterly different sources of law, by asserting that a statutory right to sue somehow emerges from unspecified "common law." The District cites no authority for this kind of statutory construction, and none exists. Reduced to its essence, the District's contention as to why the Court should recognize a separate right to sue is nothing more than a request that the Court engage in legislating. This would be totally improper.

When the instant statute was enacted, the Council created a very new kind of statute, in an effort to deal with a problem that seemed intractable. The Council clearly could have included a separate right of action for the District if it

had desired to do so. This did not happen. It is not the business of the Superior Court to re-write a statute. In all the years since the enactment of this law, no one has used it until now--and the Council has not taken any steps to broaden it or amend it for any reason. The Court has no power to tinker with the statute in order to boost the merits of one party's position over another.

In this context, it is important to recall the very important principle that guides every trial court engaged in statutory construction. The Court of Appeals has observed that the legislature "is presumed to have been aware of existing statutes" when laws are enacted on the same subject matter. *United States v. Willie Brown,* 422 A.2d 1281, 1284 (D.C. 1980). The Council knew, when it enacted the Strict Liability Act, that the Code contained several pre-existing subrogation statutes to regulate the litigation relationship between the District, its employees, and its citizens. Consequently, since the Act itself does not grant the District an independent right to sue, this is not presumed to be an accident or innocent omission, since the basic subject of how the District can pursue the claims of others is already subject to statutory strictures. The Court thus concludes that the facial lack of language granting the District its own right to sue was a choice.

The District asserts another argument in support of its assertion that the Act affords a separate right to sue for the District. In its Opposition, the District asserts that it has a separate right of action based upon the Act's reference to "direct and consequential damages that arise from bodily injury or death." D.C. Code § 7-2551.02. This argument is extremely weak. The District totally mis-applies that legal term of art.

The use of the phrase "direct and consequential damages" is not by any means a reference to the District as a separate, putative claimant of "consequential damages." Rather, it is nothing more than a common statutory reference

to damages that are traditionally included in civil actions for all types of personal injury, where secondary types of damage are traceable to the original injury itself. *See, e.g. Bogen v. Green,* 239 A.2d 154 (D.C. 1968) (finding that a proper form of "consequential damages" for injury from an automobile collision could include loss of rental income due to inability of the plaintiff to continue work as a landlord). The concept of consequential damages is also seen, for example, where appellate courts permit a plaintiff to recover for personal injuries that flow from a breach of warranty. *See Payne v. Soft Sheen Prods., Inc.,* 486 A.2d 712, 719 (D.C. 1985).

Classically, the term "consequential damages" means those losses or injuries "which are a result of an act but are not direct and immediate." BLACK'S LAW DICTIONARY, 352 (5th ed. 1979). Where consequential damages are concerned, such damages relate to the same plaintiff and this terminology has no connection to creating rights to sue by third parties that are not the same persons who were injured by the predicate tort.

The Bar to Municipal Cost Recovery. Defendants argue that the District's claim under Count I includes not only the health care reimbursement issue, but a much broader assertion that the Strict Liability Act is the basis for seeking damages for unspecified "costs of other assistance and compensation." The District, in its Opposition, does not hide the fact that it is seeking broad cost recovery for providing law enforcement and other municipal services that are somehow associated with "gun violence" and are not related specifically to anyone's personal injuries. *See* Opposition at 11. To the extent that the District's claim goes beyond the field of health care reimbursement via subrogation, the attempt to obtain damages that cover appropriated funds for generalized law enforcement are plainly not within the ambit of "personal injuries." Even if the District did have an independent right

of action to obtain reimbursement for the cost of funding medical care for "personal injuries," this amorphous aspect of the claim would not be covered by the Act.

Furthermore, the defendants cite an important local appellate opinion that is squarely on point as to the bar to generalized municipal cost recovery. This is the federal decision in *District of Columbia v. Air Florida, Inc.*, 243 U.S. App. D.C. 1, 750 F.2d 1077 (1984). In *Air Florida,* the District sued that airline in tort, alleging entitlement to damages for the costs of "emergency and cleanup expenses" incurred as a result of a plane that crashed into the 14th Street Bridge in 1982. The expenses were alleged to be "in excess of three-quarters of a million dollars, in rescuing survivors, recovering bodies of the deceased, and raising the airplane and its contents from the river." *Id.* at 3, 750 F.2d at 1979 (footnote omitted).

The District Court's dismissal of that lawsuit pursuant to Rule 12(b)(6) was affirmed by the United States Court of Appeals for the District of Columbia Circuit. The panel observed,

> The general common-law rule in force in other jurisdictions provides that, absent authorizing legislation, 'the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service.' We think that the Ninth Circuit, *in City of Flagstaff v. Atchison, Topeka and Santa Fe Railway Co.,* has offered a persuasive rationale for this common-law rule, and we adopt both their reasoning and the rule here. Where emergency services are provided by the government and the costs are spread by taxes, the tortfeasor does not anticipate a demand for reimbursement.

> Although settled expectations must sometimes be disregarded when new tort doctrines are needed to remedy an inequitable allocation of risks and costs, where a generally fair system for spreading the costs of accidents is already in effect--as it is here through assessing taxpayers the expense of emergency services--we do not find that argument for judicial adjustment of liability to be compelling.

Id. at 4, 750 F.2d at 1080 (footnotes omitted).[15]

The United States Court of Appeals pointedly explained, "We are especially reluctant to reallocate risks where a governmental entity is the injured party. It is critically important to recognize that the government's decision to provide tax-supported services is a legislative policy determination. It is not the place of the courts to modify such decisions." *Id.*

Leaving aside the District's attempt to avail itself of the subrogation statutes, it is certainly clear that the Strict Liability Act on its face does not authorize the District to sue for the costs of emergency public services, or to pursue damages for any type of municipal costs, whether they stem from medical care or purchasing police gear.

This Court has looked closely at the District's argument on the subject of municipal cost recovery. The most that the District can say is that "the District's direct cause of action for damages under the Health-Care Act and Police and Firefighters Act, and other damages it is authorized to recover under the Strict Liability Act, cannot be defeated by the common-law prohibition against recovery or governmental

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15 *See City of Flagstaff v. Atchison, Topeka and Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983).

functions." Opposition at 19. This argument is wide of the mark in two respects. First, the Strict Liability Act grants no separate right of action to the District for any type of lawsuit. The District's tactic of merely reciting that it does is wasteful and unhelpful. Secondly, the District's reliance upon the Health-Care Act and the Police and Firefighters Act is subject to the terms of those particular laws, and the requirements for sufficiency of pleading thereunder. This is the problem that the District has dodged altogether. See further discussion, *infra,* regarding "Count IV: Subrogated Claims Under Public Reimbursement Statutes."

Count I: The Strict Liability Act--Constitutional Issues

Defendants attack the sufficiency of the Complaint on constitutional grounds, as well as on grounds of insufficient factual allegations. Ordinarily, courts do not pass upon the constitutionality of legislation if the case can be decided on other grounds, by which the constitutional issue can be avoided. *See United States v. Locke,* 471 U.S. 84, 92, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985). Because this Court finds that the plaintiffs have failed to sufficiently plead the factual basis for this cause of action, there is technically no need for the Court to decide whether the Strict Liability Act is unconstitutional. However, the parties herein have briefed this issue as an important one and it would be a disservice to the parties to ignore it. For the sake of completeness, then, it is prudent for the Court to set forth how it would interpret the constitutional question if there were no other basis for resolving the Motion for Judgment on the Pleadings.

In short, if there were no other basis on which to adjudicate the legal sufficiency of the claim in Count I, this Court would be compelled to grant the instant motion on constitutional grounds.

To understand why the Strict Liability Act is a legally insufficient basis for this lawsuit, it is important to focus on the nature of the constitutional attack and then to sift through

the reasons why the plaintiffs' response is unconvincing. The constitutional problem with this statute is more sophisticated than plaintiffs admit, and they fail to confront the problem for what it is.

The challenge brought by the defendants embraces both the Commerce Clause[16] as well as the Due Process Clause of both the Fifth and Fourteenth Amendments.[17] First, as to the Commerce Clause, defendants' central argument is set forth as follows:

> Implementation of the Strict Liability Act violates the Commerce Clause because the Act does and was meant to restrict commercial behavior beyond the borders of the District of Columbia. One need only look at the words of the Act's sponsor, David Clarke, in introducing the Act's predecessor: '[This legislation] will lead to far few handguns, not only in the district, but *in the nation as a whole.*' Memorandum from Clarke to members of D.C. Council Re: Introduction of Strict Liabil-

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[16] Article I, Section, Clause 3 of the United States Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States...."

[17] The Fourteenth Amendment does not apply literally to the District of Columbia. It is assumed that the same constitutional protections would be covered by the Fifth Amendment. *Bolling v. Sharpe,* 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954). The Fourteenth Amendment process that no State shall "deprive any person of life, liberty, or property, without due process of law...." The Fifth Amendment provides in pertinent part that no person shall "be deprived of life, liberty, or property without due process of law...."

> ity Legislation (1989)(emphasis added). The Commerce Clause, however, does not allow the District to foist its policy choices onto other states.

Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 45 (footnote omitted).

A review of applicable Supreme Court case law on the Commerce Clause yields clear prohibitions against the attempts of local legislatures to regulate commercial activities beyond their borders. Certain cases are directly on point. The United States Supreme Court has held:

> [T]he 'Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, *whether or not the commerce has effects within the State,* [*Edgar v. MITE Corp.*, 457 U.S. 624, 642-643, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982)] ... The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State ...
>
> [T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.

Healy v. Beer Inst., Inc., 491 U.S. 324, 336, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)(internal citations omitted).

The Supreme Court likewise struck down as unconstitutional a New York statute that required every liquor distiller or producer that sells liquor to wholesalers within the State to sell at a price that was no higher than the lowest price the distiller charged wholesalers anywhere else in the United States. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986). The Court ruled, "While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess." *Id.* at 580.

Though the District's Assault Weapon Strict Liability Act is not designed to discretely regulate pricing, etc., it is far broader in its intended reach. It confers strict liability for all damages that flow from the discharge of such weapons inside the District, without regard to any allegation or proof of "fault." This is a constitutional problem of even greater scope than the issue concerning the New York liquor statute. This is because there is no way of avoiding liability under the Act without going out of business altogether or at least implementing a substantial overhaul of the entire set of relationships with suppliers, distributors, etc. Such drastic changes in the structure of the firearms business (even as to only certain classes of weapons) are either not mandated at all by other jurisdictions (or by the federal government) or are not mandated consistently outside the District.

The allegations of "negligent distribution" in Count II more than explain the breadth of what would be necessary to avoid or even minimize the potential for liability under the Act. To avoid "strict liability," the defendants would have to make nation-wide changes in how they do business, because the most recent geographic source of any illegal assault weapon cannot necessarily be ascertained. Moreover, the

passage of a weapon through interstate commerce does not always implicate a direct route between the District and only one other jurisdiction at a time. The statutorily banned weapons could come from literally anywhere.

The Strict Liability Act need not represent a formal "regulatory" scheme to be violative of the Commerce Clause or the Due Process Clause. The use of pro-active lawsuits that are filed pursuant to the Act can also be a strategic method of improperly imposing a jurisdiction's regulatory policy. Making this very point, the Supreme Court has realistically observed, "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 247, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959). This is why the plaintiffs herein are mistaken, if not disingenuous, when they contend that "the Act does not enjoin or prohibit the production of assault weapons and machine guns, nor does it attempt to control or to regulate them beyond the borders of the District of Columbia." Plaintiff's Opposition to Defendants' Motion for Judgment on the Pleadings at 50. The instant lawsuit is a direct attempt to use the Act as a tool of policy enforcement through the collection of money damages.

The response of the plaintiffs to the Commerce Clause challenge focuses primarily on two chief points. One, the plaintiffs argue,

> The Act treats in-state and out-of-state manufacturers and distributors identically.
>
> Where, as here, Defendants cannot show that the Strict Liability Act is discriminatory, the Supreme Court applies a different inquiry, as set forth in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). Under *Pike,* a statute must be upheld if it serves a 'legitimate public interest,' its ef-

> fects on interstate commerce are only 'incidental,' and the burden imposed on interstate commerce is not 'clearly excessive in relation to the putative local benefits.' *Id.* (citation omitted) (underlining in original).

Opposition at 49. Secondly, plaintiffs broadly contend that "[p]ublic health and safety measures are accorded a "presumption of validity," which must be rebutted by the party challenging the statute." Opposition at 49 n. 27. When both of these arguments are examined closely, they ultimately do not provide adequate support for the plaintiffs.

First, the plaintiffs make only a very weak point when they claim that the Act is non-discriminatory. To say that in-state and out-of-state industries are not treated differently is an empty contention. There are literally no "in-state" gun manufacturers, importers, or sellers operating inside the District of Columbia. Consequently, it is pointless to justify the Act by stating that it does not erect unfair advantages for "in-state" manufacturers, etc. over their "out-of-state" cohorts. There are no industries within the District that compete with the defendants herein. The manufacture and sale of firearms in the District had been outlawed decades before the Act was ever passed.

The "discrimination" problem is more complicated, because the defendants' products are not subject to any kind of operational regulation in the District of Columbia. Significantly, the Act does not even apply to situations that are not caused by intervening criminal conduct. Thus, out-of-state industries would be subject to massive requirements for changing their business operations only because of District of Columbia law, when other jurisdictions do not impose this kind of expense and regulation. A judgment on the pleadings is appropriate here, because all these points are discernable without the need for any discovery.

Leaving aside the issue of whether the Act is discriminatory, the Act does not even pass muster under the *Pike* analysis. This is easily shown merely by reference to what is contained within the four corners of the Complaint itself. To examine pleading deficiencies as such, it is instructive to view Count I and Count II in juxtaposition to each other. In light of the plaintiffs' own description in Count II of how the "negligent distribution" allegedly occurred and how it could have been alleviated (and how it occurs), it is obvious that the use of the Act as a basis for litigation cannot possibly have only an "incidental" impact on interstate commerce.[18] The plaintiffs cannot reconcile the concept of "incidental" with the broad kinds of relief that they seek through injunctions, strict liability damages, and what they imply in Count III to be "abatement." Defendants complain bluntly that the only way to avoid liability under the Act is to cease doing business. The position of the defendants on the implications of plaintiffs' lawsuit is not farfetched.

The Due Process challenge to the Act is the contention that the Complaint "likewise violates the guarantee of due process by arbitrarily attempting to impose the District's regulatory scheme beyond its borders." Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 46. The whole concept of territoriality is at the heart of the due process problem with this Act. Moreover, the territoriality issue compromises the public nuisance allegation in Count III as well. See further discussion, *supra,* as to Count III. This is because the Mayor has no police powers to engage in abatement activity outside the District of Columbia.

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[18] This is only one example of why the various Counts ought not to be viewed out of context with each other. The practical interplay among them is unmistakable.

There are not large numbers of published appellate opinions on the subject of territorial limits to police powers, because the geographic confines of State police powers are so self-evident. Nonetheless, the District of Columbia Court of Appeals long ago had occasion to reiterate the concrete limits of local regulatory power. *See Mann v. District of Columbia,* 22 App. D.C. 138 (1903). The facts in *Mann* are illustrative of the territoriality limitations that apply herein.

In *Mann,* the Court of Appeals reviewed the level of enforcement of the District's law that prohibited any person from removing a dead animal to a place of disposal that was not authorized by the Commissioners of the District of Columbia. A District citizen was caught transporting his dead horse through the streets of the District--to a factory in Virginia. He was charged with a violation of the District's law because the Virginia site was not an approved disposal facility. He was ultimately exonerated of any liability under the District of Columbia Code. The Court of Appeals explained,

> [The] question in the present case is not difficult of solution; for it is very plain that the commissioners of the District of Columbia are without authority of law to control [an individual] in the disposition which he makes of his property outside of this District.... The regulation cannot be allowed any extraterritorial force ... [and] is not applicable to the individual citizen who removes his property beyond the jurisdiction.

Id. at 146-47.

The United States Supreme Court has also stated that from principles of state sovereignty and comity "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 572, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

At best, the plaintiffs only raise two points in an attempt to justify the extraterritorial regulation through the Act and through this litigation. One, they argue that there is no constitutional problem because the Act is one that addresses public safety concerns. The plaintiffs rely, for example, on a Supreme Court case where the Court stated that it could "think of no better example of police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison,* 529 U.S. 598, 618, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000). That suppression of violent crime is a solid example of local "police power" is not in dispute. The quotation from *Morrison* is a pithy statement that no one denies.[19] The citation to such observations utterly begs the real question.

That public safety is a valid state concern begs the question of whether the United States Constitution permits extraterritorial exercise of such police powers specifically to pursue that particular local interest. It does not--and the plaintiffs cite absolutely no authority for such an exception. This is the real issue.

Finally, the plaintiffs argue that the cases "are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it."[20] *Young v. Masci,* 289 U.S. 253, 258-59,

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[19] The opinion in *Morrison* did not involve a constitutional challenge to a State law. Rather, is concerned an attack on a federal statute that provided civil remedies to victims of gender-motivated violence. The Supreme Court ruled that the Commerce Clause did not permit Congress to enact this statute.

[20] *See* Opposition to Defendants Motion for Judgment on the Pleadings at 53.

53 S. Ct. 599, 77 L. Ed. 1158 (1933). As support for this principle, the plaintiffs rely on *Young v. Masci.* However, the facts in *Young v. Masci* are distinguishable from the present case.

In a nutshell, *Young v. Masci* involved a Due Process Clause challenge to a New York statute that imposed liability upon every owner of a motor vehicle for personal injuries that result from operation of vehicles driven within New York with permission of the owner. The owner in issue was not a resident of New York. Finding no Due Process Clause violation, the Supreme Court observed that this particular owner brought liability upon himself when he gave the driver permission to take the vehicle across State lines, into New York. The Court stated, "When Young gave permission to drive his car to New York, he subjected himself to the legal consequences imposed by that State upon Balbino's negligent driving as fully as if he had stood in the relation of master to servant. A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument." *Id.* at 258.

Unlike the allegations against the defendants in the instant case, the owner in *Young v. Masci,* intentionally permitted the instrumentality of the damage to cross State lines into New York. That the instrumentality eventually caused damage to others inside of New York was not intended, of course. However, the permission to take it to New York was indeed the intent of the owner.

By contrast, nothing in the Complaint herein alleges that the defendants specifically intended to cause assault weapons or other prohibited weapons to enter the District of Columbia through other jurisdictions. The Supreme Court opinion in *Young* is inapposite. The plaintiffs have inflated its importance far beyond its actual meaning.

Amicus Curiae argues that there is no constitutional defect in the Act, citing a Supreme Court case involving state law affecting the retail automobile industry. *Worldwide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980). In that case, the Court stated:

> The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by the consumers in the forum state.

Id. at 297-98. This case is unhelpful for two reasons. First, it addresses personal jurisdiction, not liability. Second, automobiles are not legislated to be contraband in any part of the United States. This is an important distinction because no firearms can be legally sold or distributed in the District of Columbia. Hence, no defendant herein could expect that its products would be purchased lawfully in the District of Columbia. In *Worldwide,* it was obvious that the expectation of sales was the expectation of lawful sales.

The proverbial "bottom line" is that the invocation of a law aimed at public safety is not, in and of itself, an exception to the requirements of the Due Process Clause. There is no real difference between impermissible extraterritorial regulation that is effectuated through legislation or through the filing of claims for damages.

In other words, the plaintiffs may not obtain from the Judicial Branch an impermissible form of manipulating interstate commerce where such relief cannot be obtained from the Executive Branch or the Legislative Branch. On this principle, the Supreme Court has observed, "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *BMW, supra,* at 573 n. 17. The Court also has said, "It matters not that that law has

been applied in a civil action and that it is common law only.... The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *New York Times Co. v. Sullivan,* 376 U.S. 254, 265, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

The three Branches of government are coequal. If one Branch is precluded from regulating commerce outside of the District, the others are precluded from doing so as well, through their own respective processes.

Count IV: Subrogated Claims Under Public Reimbursement Statutes

The District's subrogation claims are beset with many pleading deficiencies. The Complaint is oddly organized and worded in a variety of ways.[21] There is an ambiguity as to whether the District relies on the three subrogation statutes as the basis for its right to sue in any of the substantive Counts other than Count I. In either event, the subrogation claims must be dismissed.

1. Facial Deficiencies as to Filing Prerequisites. The District's reliance upon the three subrogation statutes was insufficiently pleaded because facts essential to a claim under any of these statutes are not alleged. Certain missing allegations affect only one statute, but other missing allegations affect all three of them. In a nutshell, the facial deficiencies in the Complaint are: (1) the failure to plead that the District has obtained assignments from specific employees, where required under the Merit Personnel Act and (2) the failure to identify the underlying beneficiaries and the fundamental ba-

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21 For example, the subrogation statutes are set forth in a separate Count, as if they form a substantive cause of action such as breach of contract, fraud, etc.

sis for each such claim under all three of the subrogation statutes. The District, like any other subrogee must include in a Complaint the identity of the person whose claim is being asserted, as well as the facts that each such individual claimant would have been required to plead if that person had filed his or her own lawsuit.

It is not sufficient as a matter of law for the District to make a sweeping, categorical claim that unnamed employees or citizens were injured and that the defendants are collectively responsible for injuries that are neither specified nor linked to any particular defendant's product.

As a practical matter, what the District is doing in this Complaint is tantamount to an insurance company filing a subrogation action without even identifying its insured, or without revealing the date or description of the insured's injury. This type of "say-nothing" pleading is unknown in the Superior Court. It would not be permissible in an ordinary collision case that is brought by a subrogee insurance company. The District should not be permitted to do what no other subrogee would be allowed to do. Certain aspects of the pleading deficiencies are illuminated in more detail below.

First, the District seeks damages under the Merit Personnel Act in the form of reimbursement for salaries and benefits of law enforcement personnel and related public employees caused by "gun violence." The District's claims under this particular statute are, on the face of the Complaint, insufficient as a matter of law to support any judgment. The District has not pleaded what the statute specifically requires for recovery under the statute.

The statute itself does not leave such requirements to any guesswork. The Code provides that the District may file suit, for subrogated claims, where the Mayor obtains an "assignment" to the District of the "right of action" of the relevant "beneficiary." D.C. Code § 1-623.31(a)-(b). The statute

only authorizes the Mayor to "prosecute or compromise a cause of action "*assigned* to the District of Columbia government." D.C. Code § 1-623.31(c) (emphasis added). This portion of the statute is pivotal, because it references the assignment of rights in the past tense, signaling that the assignment of the right to sue must pre-date the filing of the District's own lawsuit. The District essentially has no defense to this defect in the Complaint. There is no assertion by the District in the Complaint that it has obtained an assignment from any District employee under this statute. For this reason alone, the claims under the Merit Personnel Act must fail, and judgment should be entered in favor of all defendants on this claim.

The issue of obtaining assignments operates differently with respect to claims for Medicaid reimbursement. Under the Health Care Assistance Act, the District's subrogation rights commence "[a]s soon as the District begins providing health-care assistance to *a beneficiary,*" although the Mayor "[a]lternatively, or in addition to the legal subrogation ... may require a beneficiary to execute a written assignment of that same right or claim." D.C. Code § 4-602(b) (2001) (emphasis added). The reference to "a beneficiary" imposes the need to identify the person who qualified for this assistance. An assignment is not a condition precedent to the District's right to sue, although the failure to name the underlying beneficiaries is still a legal flaw in the Complaint.[22]

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[22] The Court is not impressed with the defendants' argument that plaintiffs' allegations under the "Healthcare Act" must fail because of the District's failure to plead that individual beneficiaries were given notice of their right to intervene, right to sue, etc. *See* D.C. Code § 4-606(b) (2000); D.C. Mun. Regs. Title 29, § 1402.2. The failure to include a statement of such notice within the Complaint is not a fatal flaw, because it is not a precondition to filing suit.

[Footnote continued on next page]

Presumably, the District relies upon the Merit Personnel Act as its authorization to file suit as to claims that are beyond those alleged under the Strict Liability Act. Clearly, the Strict Liability Act does not even apply to damages that do not arise from specific, individual personal injuries. Thus, the District could not recover any money for salaries, benefits, etc. that are merely related to law enforcement or public safety functions in general.

As to causes of action that are *not* dependent upon the Strict Liability Act, the District's subrogation claims are not sufficiently pleaded as a matter of law, for different reasons.

There is a distinct facial defect in pleading that infects the reference to all three of the subrogation statutes. The District has failed, indeed declined, to reveal in the Complaint the identities of the employees and citizens whose personal injury expenses were borne by the District.

The need to identify the underlying beneficiary or subrogor in this kind of lawsuit is so self-evident that scarcely anyone litigates this requirement. At least one other court, however, has dismissed an action for violating this very elemental requirement of pleading. The decision on point is *Seibels Bruce Group, Inc. v. Reynolds Tobacco Co.*, No. C-99-0593 MHP, 1999 U.S. Dist. LEXIS 15320 at *1 (N.D. Cal. 1999) (Patel, C.J.). This case illustrates another plaintiff's fatal mistake in attempting to sue for injuries to a large mass of individuals without naming such persons and the

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Nonetheless, the mere fact that the municipal regulations require such notice indirectly indicates that the District must at least reveal the names of the beneficiaries in the Complaint itself. *See* further discussion in text of *Seibels Bruce Group, Inc. v. Reynolds Tobacco Co., infra.*

corresponding bases for their lawsuits--doing so entirely outside the rigors of class action litigation. The published opinion in *Seibels* highlights the conceptual principles that establish why, as a threshold matter, a Complaint must explicitly identify each person who was actually injured and the basis on which that person would have had a claim against a particular defendant.

In *Seibels,* the plaintiff (the Seibels Bruce Group, Inc.) was an insurance company that had insured a number of asbestos companies that were sued for personal injuries arising from exposure to products containing asbestos. Among other claims, the plaintiff in *Seibels* sought to recover money it had paid out on behalf of its insured from various tobacco companies (under a theory that tobacco use had contributed to the diseases linked to asbestos).

Defendants in *Seibels* filed a motion to dismiss, pursuant to Rule 12(b)(6). Among other issues in the motion, defendants attacked the sufficiency of pleading of the plaintiff's subrogation claim. Defendants argued that

> Plaintiff has failed to satisfy the burden of pleading a claim for subrogation because the [plaintiff] fails to identify any specific settlements, judgments or lawsuits for which plaintiff paid claims.

Id. at *29. The plaintiff contended that "the facts defendants would require ... are only necessary in establishing plaintiff's burden of proof at trial." *Id.* This is essentially the position of the District in the present lawsuit.

The United States District Judge determined that "plaintiff must still comply with Federal Rule of Civil Procedure 8(a), which requires plaintiff to provide notice of the underlying facts to defendants so they may properly defend and answer the complaint. Plaintiff here has not done so." *Id.* at * 1.

The District Judge recognized that defendants should not "confuse the requirements of properly pleading facts in a complaint with proof at trial." *Id.* at *30. Nonetheless, the District Court found that the level of specificity in the Complaint was legally insufficient:

> [P]laintiff does not provide defendants with notice of whose shoes they stand in, *i.e.*, for which of their insured companies are they asserting a claim of contribution. Additionally, although plaintiff asserts that it paid out almost $2.5 million, plaintiff does not provide any information on the breakdown of this money or when such money was paid. In its complaint, a subrogee 'should allege the facts on which the claim of subrogation is based; *e.g.*, that on a certain date plaintiff, acting under a legal necessity as ... insurer, discharged a debt or obligation owning from [defendant] to [subrogor].' 5. B.E. Witkin, Witkin California Procedure 863 (4th ed.1997). It is important to remember that a subrogation action is subject to the same statute of limitations that applies to the subrogor's action and begins to run at the same time. *See Commercial Union Assurance Co. v. City of San Jose,* 127 Cal. App. 3d 730, 734, 179 Cal. Rptr. 814 (1982). Therefore, plaintiff must plead facts to give defendants notice of the running of the statute of limitations for the contribution or equitable indemnity claim; it has not done so.

Id. at *31-32 (footnotes omitted). Clearly, the concept of fair notice is a vital requirement of pleading a subrogation action. The District has utterly failed to provide such notice.

The District has pleaded itself into the same trap that required the dismissal of the lawsuit in *Seibels*. This case is

not a class action, and it is clear that the subrogation statutes do not authorize class actions. The statutes speak, not in the plural, but only in the singular form of referring to "a beneficiary" when describing procedures for filing suit. See further discussion, *infra,* as to Beneficiaries' Right to Sue. The District has run afoul of very basic pleading requirements, and this is not a close question.[23]

2. Legal Deficiencies as to Underlying Beneficiaries' Right to Sue. The claims under the Police and Firefighters Act and the Merit Personnel Act claims have a defect in that the public employees upon whose claims the District purports to base its suit are precluded from filing suits for injuries they sustain while performing their ordinary public duties as police officers, firefighters, etc. The District cannot possibly have any legal rights that are greater than the underlying rights of the public employees. If the law would preclude the individual lawsuits, the District cannot proceed with the same claim.

The District of Columbia Court of Appeals long ago recognized that a subrogee (here, the District) is subject to the same defenses that may be asserted against the underlying beneficiary. *Aetna Cas. & Sur. Co. v. Windsor,* 353 A.2d

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[23] The District sought to amend the Complaint two times subsequent to the filing of the Motion to Dismiss, wherein this pleading deficiency was highlighted. Yet, the District has never filed an Amended Complaint with enlarged factual allegations so as to moot this issue. The Court infers that the District is either unable to do so or that the District refuses to do so as a tactical choice of some kind. If the District has chosen the latter course, it did so at its peril. Ultimately, the reason for the deficiency is not important because this pivotal aspect of pleading the allegation simply is not there.

684, 685 (D.C. 1976), citing *Williams v. Globe Indem. Co.*, 507 F.2d 837, 839 (8th Cir. 1974), *cert. denied,* 421 U.S. 948, 95 S. Ct. 1679, 44 L. Ed. 2d 101 (1975) ("The theory of subrogation is that the subrogee steps into the shoes of his subrogor. As such, he takes subject to all defenses which the third party could have asserted against the subrogor....").

As defendants point out, the law of the District of Columbia squarely prohibits public employees in law enforcement and safety professionals from suing persons who injure them in the line of duty (such as criminals). This legal principle is known as the "professional rescuers' doctrine." The Court of Appeals has observed,

> This doctrine bars those engaged in rescue work as a part of their employment from recovering damages for injuries sustained on the job as the result of the negligence of the person rescued.

Lee v. Luigi, Inc., 696 A.2d 1371, 1373-74 (D.C. 1997). This rule "generally bars those whose business it is to prevent injury and save lives from tort recovery for injuries sustained from known hazards in the course of their work." *Young v. Sherwin-Williams Co., Inc.*, 569 A.2d 1173, 1175 (D.C. 1990). The Court of Appeals of the District of Columbia has applied this doctrine to preclude suits by police officers, firefighters, and emergency medical technicians. *See Lee, supra* (police officer); *Young, supra* (firefighter), *Melton v. Crane Rental Co.*, 742 A.2d 875 (D.C. 1999)(emergency medical technician). The Court of Appeals makes no distinction between "known hazards" caused by criminals, tortfeasors, or any other miscreants.

The doctrine applies even if the injury in question was caused by intentional misconduct. Notably, the Court of Appeals has recognized that the core of the doctrine is the fact that law enforcement officers and other professional rescuers "voluntarily assume the risks of their employment ... In this

analysis, therefore, the degree of culpability of the person who has created the hazard is irrelevant." *Young, supra,* at 1178. Consequently, the doctrine would certainly apply to the corporate defendants herein, as well as to the individual criminals (or other negligent persons) who actually discharge firearms that cause injury or death.

The District's reliance on the Strict Liability Act effects no diminution of the professional rescuer doctrine. The Act does not confer upon any public employee a new right of action that the employee otherwise does not have. It merely purports to remove the requirement of proving "fault" as an element of proof.

The District's claim filed pursuant to these three statutes is a broad categorical one that gathers together potentially thousands of beneficiaries as a group. Yet, the Complaint is not filed as a class action of any kind. More importantly, none of the subrogation statutes authorize the District to file class actions. By their own internal wording they consistently speak of "the beneficiary," so as to link the District's claim to a known individual. Without such identities being included in the Complaint, no defendant can file an intelligent admission or denial that the discharge of one of its covered products is linked to injury of any particular person.

In the final analysis, the three subrogation statutes do not serve to absolve the District of the same pleading requirements that original beneficiaries would have to fulfill. An individual plaintiff would have to allege that he or she was injured in a particular manner or a particular incident, that certain medical services were required, that certain other losses were suffered, etc.[24] The only factor that changes--by

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[24] For example, no one would seriously argue that a plaintiff in a collision case should not be required to identify the date on which

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resort to the subrogation statutes--is the identity of the party who must recite such facts on the face of the Complaint.

The District cannot persuasively argue, as it does, that it is entitled to file claims that would not survive this motion if they had been filed by an individual.

One point that is debated between the District and the defendants deserves clarification. The defendants contend that the District impermissibly attempts to maintain its Strict Liability claim by "aggregating" claims concerning reimbursement for health care provided to citizens and for various forms of monetary relief and assistance provided to public employees who have been injured or killed by weapons covered by the Act. The plaintiffs have cited ample case law to defend the propriety and legal sufficiency of aggregating claims without having to recite the details of individual incidents in the same way that individual claims are described by Lawson and the other plaintiffs.

Upon reflection, the plaintiffs are only partly correct, because they inflate the nature of the point made by the defendant. The Court agrees with the District insofar as the District should not be required (within the Complaint itself) to describe the narrative details of individual *incidents* where public employee injuries are the subject. However, this has nothing to do with the requirement that the District at least allege in the Complaint that it has obtained pre-filing as-

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the collision occurred and the location of the incident. The District's Complaint is devoid of these kinds of bare bones facts. Indeed, nothing on the face of the Complaint gives enough information for a defendant to figure out if the allegation is timely made under the applicable statute of limitations (a matter that must be included in the Answer as a substantive defense).

signments from any employees on whose claim it is suing. If the District has complied with the law, this should not be any burden.

To be sure, some of the public employees whose expenses are the subject of the District's claim are not so-called "professional rescuers." The District's claim that relates to so-called "non-rescuers" is legally faulty at this early pleading stage because the underlying, individual claimant could never sue another person without revealing his or her own identity. A plaintiff cannot wear a mask. Thus, any entity that purports to file a derivative suit or its own suit based upon the injuries to another person should not be permitted to hide the basic source of the claim.

To underscore this point, it is useful to note that the "Health Care Assistance Act" is the statute under which the District seeks reimbursement for any medical care provided to any employee or citizen who has been injured by unspecified "gun violence" both in the past and in the future. Without drawing distinctions between its claims under Count I or Count II, the District seeks money damages for "health care costs and Medicaid expenses" that the District "has incurred and *will* incur" with respect to its citizens. Complaint at ¶ 97 (emphasis added).

The claim for unspecified *future* costs is not supportable under any of the subrogation statutes, which relate only to costs traceable to "a beneficiary" that already have been incurred. The District has provided no legal basis for asserting a claim to expenses that have not arisen at all. The Code itself speaks of the District's subrogation right as one that springs forth "[a]s soon as the District begins providing health-care assistance to a beneficiary...." D.C. Code § 4-602(b) (2001). Clearly, no judgment could be imposed against the defendants for speculative costs of the next several decades and beyond.

Count V: Collective Liability Theory of Damages

In Count V, the plaintiffs state the following:

> In addition to their individual liability, Defendants are collectively liable for the particular harms to Plaintiffs because Defendants' tortious conduct has collectively caused the circumstances that have caused the particular harms to Plaintiffs.

Complaint at ¶ 102. The defendants articulate why the theory of liability articulated in Count V is not legally supportable. Count V does not raise a separate and distinct substantive cause of action. Instead, it is a summary or projection of the conceptual framework under which the District expects to establish liability. The defendants have interpreted the plaintiffs' reference to "collective liability" as a reference to the more familiar term of art, "market share liability." There is no reason to do otherwise, and the parties have briefed the issue in this way.

Even if all the substantive causes of action had been pleaded sufficiently as against each defendant, the Complaint must be dismissed to the extent that plaintiffs seek anything other than individualized liability of each defendant. In other words, this case is not pleaded in such a way as to erect a lawful demand for damages based on the concept of "market share liability" or any other iteration of this theory. There is ample case law to demonstrate this point, and it totally favors the defendants. *See Hamilton v. Beretta, supra,* discussed further herein below.

The Complaint itself in Count V speaks only of obtaining damages on the basis of "collective liability." Having recognized the authorities cited by defendants that negate the applicability of this concept, the plaintiffs' response is vague. For example, in the Opposition to the Motion to Dismiss, Bryant Lawson argues that "even if discovery ultimately

failed to reveal which Defendant made the gun, Mr. Lawson would be entitled to proceed on the basis of alternative liability, market share liability, or another form of collective liability." Opp. at 57.

Lawson does not in any way define what he means by the term "alternative liability" or "another form" of collective liability. This response flounders in the face of the authorities relied upon by the defendants in the exploration of "market share liability." These phrases refer to the same thing. In the absence of argument from the District to the contrary, the Court presumes that the District makes the same argument as Lawson with respect to how it expects to obtain damages from the defendants. It is important for the Court to set forth why "market share" liability cannot apply in the instant litigation.

First, it is useful to note what is meant by the concept of "market share" liability and when a plaintiff will be permitted to resort to it. This was explained in rather straightforward fashion by the Court of Appeals of New York in *Hamilton v. Beretta, supra.* That Court stated:

> Market share liability provides an exception to the general rule that in common-law negligence actions, a plaintiff must prove that the defendant's conduct was a cause-in-fact of the injury. This Court first examined and adopted the market share theory of liability in *Hymowitz v. Eli Lilly & Co.* (73 N.Y.2d 487 [1989], *supra*). In *Hymowitz,* we held that plaintiffs injured by the drug DES were not required to prove which defendant manufactured the drug that injured them but instead, every manufacturer would be held responsible for every plaintiff's injury based on its share of the DES market. Market share liability was necessary in *Hymowitz* because DES was a

> fungible product and identification of the actual manufacturer that caused the injury to a particular plaintiff was impossible. The Court carefully noted that the DES situation was unique.

Hamilton v. Beretta, *supra*, at 1066-67.

The Court in *Hamilton* pointed out those factors that ordinarily should define when market share liability is properly invoked as a means of apportioning damages among a large group of defendants. As to the application in DES cases, the Court of Appeals of New York stated,

> Key to our decision were the facts that (1) the manufacturers acted in a parallel manner to produce an identical, generically marketed product; (2) the manifestations of injury were far removed from the time of ingestion of the product; and (3) the Legislature made a clear policy decision to review these time-barred DES claims.

Id. at 1067 (citation omitted).

Comparing the DES case rationale to the scenario reflected in the suits against the firearms companies, the Court of Appeals of New York in *Hamilton* readily pinpointed the differences:

> Circumstances here are markedly different. Unlike DES, guns are not identical, fungible products. Significantly, it is often possible to identify the caliber and manufacturer of the handgun that caused injury to a particular plaintiff. Even more importantly--given the negligent marketing theory on which plaintiffs tried this case--plaintiffs have never asserted that the manufacturers' marketing techniques were uniform. Each manufacturer engaged in

> different marketing activities that allegedly contributed to the illegal handgun market in different ways and to different extents. Plaintiffs made no attempt to establish the relative fault of each manufacturer, but instead sought to hold them all liable based simply on market share.

Id. (footnotes omitted).[25] In the instant case, the Complaint in no way suggests that the defendants operated in a uniform fashion. In this regard, the same criticisms outlined in *Hamilton* apply to the Complaint herein. From one amended version to the other, the pleading has never changed on this subject.

Other state supreme courts have highlighted why it is virtually impossible to apply market share liability (or any similar group liability concept) to allegedly tortious use and manufacture of other kinds of non-fungible or non-generic products. The market share liability theory was disallowed in asbestos litigation. *See Gaulding v. Celotex* Corp., 772 S.W.2d 66, 71 (Tex. 1989); *Goldman v. Johns-Manville Sales Corp.*, 33 Ohio St. 3d 40, 514 N.E.2d 691, 700 (Ohio 1987). This theory of apportioning damages also has been disallowed with respect to suits involving harm from car batteries (even though the public might think of them as generic). *See York v. Lunkes,* 189 Ill. App. 3d 689, 136 Ill. Dec. 954, 545 N.E.2d 478, 480 (Ill. App. Ct. 1989). Application of market share liability has been ruled to be improper also with respect to suits concerning lead paint poisoning.

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[25] Many other jurisdictions have permitted market share liability to govern the litigation of DES cases. Those cases are too numerous to mention and would be repetitive.

See Skipworth by Williams v. Lead Indus. Ass'n, Inc., 547 Pa. 224, 690 A.2d 169, 173 (Pa. 1997).

The explanation as to why market share liability cannot apply in suits such as the present one is synthesized so well by the Court of Appeals of New York in *Hamilton,* that this Court need not dwell on the point further.

In conclusion, the various causes of action pleaded in this case are facially insufficient as a matter of law. In each instance, this is not a close question.

WHEREFORE, it is by the Court this 16th day of December, 2002

ORDERED that the plaintiffs' Third Motion for Leave to Amend the Complaint is granted; and it is

FURTHER ORDERED that the Third Amended Complaint is hereby deemed filed as of January 20, 2000; and it is

FURTHER ORDERED that the Defendants' Motion for Judgment on the Pleadings is hereby granted; and it is

FURTHER ORDERED that the Clerk of the Court shall enter a separate judgment in favor of the defendants against all plaintiffs, as to all Counts.

(2)

Supreme Court, U.S.
FILED
AUG 22 2005
OFFICE OF THE CLERK

No. 05-118

IN THE

Supreme Court of the United States

BERETTA U.S.A. CORP., ET AL.

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

BERETTA U.S.A. CORP., ET AL.

Petitioners,

v.

BRYANT LAWSON, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF OF THE STATES OF UTAH, SOUTH DAKOTA, ALABAMA, COLORADO, MICHIGAN, MONTANA, NEW HAMPSHIRE, NORTH DAKOTA, OKLAHOMA, TEXAS, WASHINGTON, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are certain States that seek to preserve a bedrock tenet of federalism: that each State in our union is sovereign and free from unjustified interference with its policy choices by other States' dictates. In violation of this tenet, the District of Columbia has passed and is enforcing a law, the Assault Weapons Manufacturing Strict Liability Act of 1990, D.C. Code § 7-2551.01 to 7-2551.03 (2001), that was intended to and does have substantial, impermissible extraterritorial effect – *i.e.*, beyond the borders of the District and into the affairs of other States. The *amici* seek to i) preserve the autonomy of individual States to determine their own policies and ii) rectify an attempt by a local governmental unit to set national policy with respect to certain products. Accordingly, the *amici* respectfully request that this Court grant certiorari and invalidate the District's Assault Weapons Manufacturing Strict Liability Act of 1990.

SUMMARY OF THE ARGUMENT

Our federal system of government provides that each State retains its sovereignty, except to the extent that sovereign powers were explicitly granted to the national government in the Constitution. Among the powers granted to the national legislature was the power "[t]o regulate Commerce with foreign Nations, and among the several States...." U.S. CONST. art. I, § 8, cl. 3. This clause has long been read to include the corollary proposition that one State cannot impose substantial burdens on interstate commerce or commerce in another State.

The District of Columbia's Assault Weapons Manufacturing Strict Liability Act of 1990, D.C. Code § 7-2551.01 to 7-2551.03 (2001) (the "Act"), flouts these rules. The Act imposes upon a manufacturer, importer or dealer of certain broadly-defined categories of firearms liability for

all direct and consequential damages caused by the discharge of those firearms within the District, without any requirement of manufacturer fault or product defect. *See* D.C. Code § 7-2551.02. The categories of firearms encompassed by the Act are neither manufactured nor sold within the District – indeed, they are illegal within the District, D.C. Code § 7.2504.01 – such that the only firearms subject to the Act are sister-State products. By imposing liability upon sister-State manufacturers for the simple act of having manufactured and sold non-defective products in States where it is lawful to do so, the District leaves those manufacturers with only two choices: abandon the products or face the potential of multimillion dollar liability in the District.

The Constitution does not permit the District or any one State to regulate commerce that occurs entirely outside its borders. Extraterritorial legislation such as this burdens other States by, among other things, i) hurting lawful businesses that provide employment for citizens and generate scarce tax revenues and ii) denying the State's citizenry the right to choose their own policies. For these reasons, this Court should grant certiorari to review the Act and strike it as unconstitutional.

ARGUMENT

The Constitution preserved the sovereignty of the individual States, while delegating to the national Congress the power, *inter alia*, to regulate commerce between the States. These complementary principles lead inescapably to one conclusion: no State has the power to control lawful commerce that occurs entirely within the borders of another State. Because the District's Act was intended to do so and actually does so, this Court should review and invalidate the Act.

I. THIS COURT SHOULD REVIEW THE ACT BECAUSE IT IMPERMISSIBLY INVADES THE SOVEREIGNTY OF SISTER STATES

The Constitution established a federal system in which each of the several States shared its sovereignty with a national government. Critical to this system was the fact that, except to the extent sovereignty was delegated to the national government, each State was sovereign within its own borders. Because the Act projects the District's policy choices into sovereign sister States, this Court should intervene to restore the Constitution's delicate balance of power.[1]

A. The Constitution Prohibits States From Infringing Upon the Sovereignty of Sister States

One of the most fundamental features of our Constitution is that each State is sovereign within its territorial borders, subject only to the supreme authority of the federal government. *See* U.S. CONST. art. VI. *See also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). As a result, this Court has produced an unbroken string of decisions recognizing that no State has authority over the internal affairs of any other State. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("A State

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[1] The District, of course, is not a State. According to the U.S. Constitution, Congress has the power to "exercise exclusive Legislation" over the District of Columbia. U.S. CONST. art. I, § 8, cl. 17. Pursuant to that power, Congress in 1973 delegated the bulk of its authority to the District of Columbia by passing the Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code §§ 1-201 *et seq.*). Because Congress's grant of authority to the District was "subject to all the restrictions and limitations imposed upon the states" by article I, § 10 of the Constitution, *see* D.C. Code § 1-203.02 (2005), *amici* will refer to the District herein as if it were a State.

does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State ... without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound."); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States."); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction. ... Each State is independent of all the others in this particular."). Stated otherwise, the bedrock of our federal system lies in the recognition that individual States enjoy "autonomy ... within their respective spheres." *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335-36 (1989).

This Court emphasized these core principles of federalism in *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996). In determining whether the punitive damage award there was "grossly excessive" in violation of the due process clause, the Court considered the scope of Alabama's legitimate state interests – specifically including whether Alabama could punish based upon out-of-State conduct that was lawful in those other States. The *Gore* Court held that "one State's power to impose burdens on the interstate market ... is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." *Id.* at 571 (citations omitted). According to the Court, "it follows from these

principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572. Because any attempt by Alabama "to alter BMW's nationwide policy ... would ... infring[e] on the policy choices of other States," Alabama was prohibited from considering lawful out-of-State conduct in rendering a punitive damage award. *Id.* at 572. Thus, the Court held that neither Alabama nor any other State could constitutionally "impose sanctions ... to deter conduct that is lawful in other jurisdictions." *Id.* at 573. While Congress has "ample authority to enact ... a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States." *Id.* at 571.

This Court then re-affirmed *Gore*'s state sovereignty analysis in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Like *Gore*, *Campbell* involved a punitive damage award from a state court that was based in part on out-of-State conduct. According to this Court, "[t]his case ... was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The [Utah court's] opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct [sic] toward the Campbells." *Id.* at 420. As in *Gore*, however, the Court held that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." *Id.* at 421 (citing *Gore*, 517 U.S. at 572; *Bigelow*, 421 U.S. at 824; *Head*, 234 U.S. at 161; and *Huntington*, 146 U.S. at 669). Indeed, expanding the *Gore* analysis, the *Campbell* Court held that, even with respect to acts that are unlawful outside of the State's jurisdiction, the State's power is limited: "[a]ny proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case,

would need to apply the laws of their relevant jurisdiction." *Id.* at 421-22. Accordingly, the Court struck down Utah's punitive damage award.

B. The Act Improperly Projects the District's Policy Choices Onto Sovereign States

The Act contravenes the principles of federalism and state sovereignty that lie at the heart of *Gore*, *Campbell*, and the Constitution. The Act imposes absolute liability upon companies for the mere act of manufacturing and selling non-defective products in States where it is legal to do so, simply because other actors – unknown to and uncontrolled by the companies – bring those products into the District and use them. Thus, the Act operates to accomplish precisely what *Gore* forbade: "impose sanctions ... to deter conduct that is lawful in other jurisdictions." 517 U.S. at 573.[2]

Under the Act, liability attaches to the manufacturers, sellers or importers of firearms that the District has chosen to define as "assault weapons" or "machine guns" whenever someone is injured in the District by the discharge of one of those firearms. *See* D.C. Code § 7-2551.02.[3] Because it is

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[2] The history of the Act further demonstrates that its purpose is to regulate conduct occurring in other jurisdictions. The sponsor of the predecessor to the Act, former D.C. Council Chairman David Clarke, is reported to have said that "the real goal is to kill the sale of these weapons throughout the country." Manhattan Institute Research Memorandum, Prohibitionism Goes To Court, Manhattan Institute for Public Policy, *2 (August 1995, No. 9).

[3] The Act does not define "assault weapon" except to say that the term "includes" certain specific products, including the Beretta AR-70, Colt AR-15 and CAR-15. The Act then defines "machine gun" by incorporating the definition in D.C. Code § 7-2501.01(10), *i.e.*, "any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot: (A) Automatically, more than 1 shot by a single function of the trigger; [or] (B) Semiautomatically, more than 12 shots without manual reloading." This definition contradicts every other

illegal to manufacture or sell such products in the District, D.C. Code § 7.2504.01, the Act is necessarily directed at manufacturers, dealers and importers located in other States. At the same time, sister-State manufacturers, dealers and importers cannot control an independent third-party's choice to transport one of these firearms across the District's borders and discharge it there (each of which is itself a criminal act in the District). Should a third-party commit these acts, however, any sister-State manufacturers, dealers or importers of the firearms are liable under the Act for any injury.[4]

Although the Act purports to impose "strict liability," the statute's language effectively imposes "absolute liability." Strict liability provides recovery for injuries proximately caused by a product "defect." *See, e.g., Webster v. Pacesetter, Inc.*, 259 F. Supp. 2d 27, 30 (D.D.C. 2003) (describing elements of strict products liability under Restatement (Second) § 402A, which the District has adopted). Thus, while a strict liability plaintiff need not prove a manufacturer's negligence, he or she still must prove i) a "defect," such as a defect in the product's design, manufacture, or warnings that ii) directly results in harm to others. *Id.* The Act, however, departs radically from traditional common law principles of strict liability because it does not require proof of fault, or any defect, or any nexus

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statutory or engineering definition of the term and sweeps within it standard and widely-used semi-automatic pistols, rifles and shotguns that are legal to make, sell and own in every other jurisdiction in the country.

[4] Thus, for example, a firearm covered by the Act could be lawfully manufactured in Arizona, lawfully sold to a licensed distributor in Ohio, lawfully sold to a licensed dealer in Texas, and (following a federally mandated background check) then lawfully sold to a qualified consumer. Nevertheless, the manufacturers and dealers would be liable under the Act even if that firearm were stolen from the owner's home, illegally transported into the District, and used by the criminal to shoot someone.

between the defect and the injury. To recover, a plaintiff need only prove that he or she was injured by an ordinary semi-automatic firearm, lawfully manufactured and marketed elsewhere, that the District has defined as an "assault weapon" or "machine gun."

In essence, the District has imposed liability upon sister-State businesses for the simple act of manufacturing, selling or importing certain firearms in States where it is lawful for those businesses to do so. This is no less an intrusion into the sovereignty of sister States than what this Court invalidated in *Gore* and *Campbell*. Stated simply, "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." *Campbell*, 538 U.S. at 421. Because the District's imposition of absolute liability establishes economic sanctions for the lawful manufacture, sale, or importation of the firearms throughout the United States, it cannot be reconciled with *Gore*'s admonition that no State can constitutionally "impose sanctions ... to deter conduct that is lawful in other jurisdictions." 517 U.S. at 573.

The District, of course, may reasonably regulate any manufacturers or dealers that engage in commerce within the District, even if there is some regulatory impact on the companies' business elsewhere. And the District is entitled to pursue its legitimate interests in controlling criminal activity within its borders. It cannot, however, do so at the expense of the sovereignty of other States. By imposing liability upon sister-State businesses for having done nothing more than pursue economic activity that is legal in those sister States, the District seeks to override the policies of other sovereign States regarding conduct within their borders. Because the District's Act seeks to control the internal affairs of other States, it should be invalidated.

II. THIS COURT SHOULD REVIEW THE ACT BECAUSE IT VIOLATES THE COMMERCE CLAUSE

The District's Act is prohibited not only by principles of state sovereignty and comity, but also by the allocation of power between the national government and the States. Specifically, the Commerce Clause makes clear that the power to regulate interstate commerce rests with the United States Congress, not with the District or any one State.

The Commerce Clause provides that "[t]he Congress shall have Power ... [t]o regulate Commerce ... among the several States." U.S. CONST. Art. I, § 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992); *Welton v. Missouri*, 91 U.S. 275 (1876)).

The Act is unconstitutional because it impermissibly regulates lawful commerce occurring wholly (and necessarily) outside the District's borders. Where a statute has such "extraterritorial reach" – that is, the statute has the practical effect of controlling conduct beyond the boundaries of the State – it is *per se* unconstitutional. *Healy*, 491 U.S. at 336.

The purpose of the Commerce Clause was to correct one of the most glaring failures of the Articles of Confederation: the imposition of laws by several States that substantially impeded the interstate flow of commerce. As this Court has noted, "the Framers granted Congress plenary authority over interstate commerce in "the conviction that in order to succeed, the new Union would have to avoid the

tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). *See generally* The Federalist No. 42 (Madison), p. 267 (C. Rossiter ed. 1961) ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience"). "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, ... has as its corollary that the states are not separable economic units." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949).

The District's Act breaches the Commerce Clause's limits on the extraterritorial reach of State power and necessarily assumes for itself the national power delegated to Congress. Specifically, as noted, the Act imposes upon manufacturers of certain types of firearms the District has labeled "assault weapons" or "machine guns" absolute liability for any injuries caused by those firearms within the District – *i.e.*, liability regardless of fault, defect or nexus to illegal conduct. In the end, the only way for a manufacturer to avoid liability under the Act is to abandon altogether the lawful manufacture and sale of the firearms covered by the Act anywhere in the United States (or elsewhere) or, in the case of "assault weapons," to sell them only to law enforcement.[5] By forcing manufacturers to abandon or radically alter their lawful commercial activities in other States, on pain of facing absolute liability and incalculable damages in the District, the District is directly and substantially regulating interstate commerce in violation of the dormant Commerce Clause.[6] For this independent but

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[5] Section 7-2551.03 of the Act contains an "exemption" from liability for "assault weapon[s]" originally distributed to law enforcement agencies.

[6] The Act effectively imposes a tax upon out-of-State

related reason, this Court should grant certiorari and invalidate the Act.

III. THE ACT HAS BROAD IMPLICATIONS FOR NATIONAL COMMERCE THAT THIS COURT SHOULD ADDRESS AND CLARIFY

The implications of the Act are significant, particularly when one considers that product-based absolute liability statutes such as the Act need not be restricted to firearms. If allowed to stand, the Act could lead to a variety of similar State-specific, product-based absolute liability statutes that would adversely impact the economies of individual States and the nation. *See Healy*, 491 U.S. at 336 ("the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.").

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manufacturers for the simple act of having manufactured and sold – in States where it is legal to do so – articles of commerce i) of which the District disapproves and ii) that someone else illegally transported into the District. *See, e.g., W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) ("Our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. Rather our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects."). The tax – in the amount of a contingent, undetermined future monetary liability – is both unquantifiable and completely outside the control of the sister-State manufacturer. It depends entirely upon whether i) someone chooses to commit a criminal act by bringing one of the prohibited firearms into the District, ii) that firearm is subsequently discharged (intentionally or accidentally) within the District, and iii) someone is injured within the District by that discharge. Each of these activities is outside the control of the manufacturers. The only way to avoid this contingent tax is to abandon the manufacture of the firearms encompassed by the Act.

In light of the District's imposition of absolute liability upon the manufacturer of certain firearms, for example, another state – "State X" – could decide to impose absolute liability upon the manufacturers of certain sport utility vehicles. Using the same logic as the District, State X's legislature could decide that certain SUVs are more likely than other vehicles to cause serious damage in an accident, and ban those SUVs within State X. That ban, however, would not prevent a motorist from illegally driving a prohibited SUV into State X. Accordingly, State X's legislature could impose absolute liability upon sister-State manufacturers of those SUVs for any injury caused by the SUVs in State X, thus giving those manufacturers an economic disincentive to continue manufacturing the SUVs. In retaliation, "State Y," where SUVs are manufactured, could then ban certain products that happen to be manufactured in State X and impose absolute liability upon the State X-based manufacturers of those products. In sum, product-based absolute liability statutes like the District's could become a basis for trade wars between the States. Indeed, if States have the power asserted by the District to regulate or obstruct lawful business activities in other jurisdictions, it is likely that the application of such power would inevitably create trade struggles among the States – causing substantial disruption to national commerce. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 151 (1978) ("local political units are expected to act in their constituents' interests," and will be "unresponsive to problems not felt by local constituents").

The Constitution specifically and clearly allocated to Congress responsibility for regulating the national economy precisely to avoid such trade wars. *See id.* at 151 n.16 ("The pursuit by each State of the particular interests of its economy and constituents [under the Articles of Confederation] nearly wrecked the national economy. 'The almost catastrophic results from this sort of situation were

harmful commercial wars and reprisals at home among the States . . . ." P. Hartman, State Taxation of Interstate Commerce 2 (1953), citing, *e.g.*, The Federalist, Nos. 7, 11, 22 (Hamilton), No. 42 (Madison)."); *Howard v. Ill. Cent. R. Co.*, 207 U.S. 463, 520 (1908) ("[T]he commerce which concerned more than one State, from its essential nature, was in part outside the territorial jurisdiction of any State, could not be governed efficiently by a single State, and, if left outside of the National control, would be subject to woeful embarrassment by the conflicting regulations of the several States into which it entered."). Congress was and is the "superintending authority over the reciprocal trade of the confederated States." The Federalist No. 42 (Madison). To ensure that Congress retains this control, this Court should review and invalidate the District's Act.

CONCLUSION

To preserve the appropriate constitutional relationships between one State and another, and to preserve for Congress its exclusive role in regulating the national economy, this Court should grant the petition, review the Act and strike it as unconstitutional.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BERETTA U.S.A. CORP., ET AL.

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

BERETTA U.S.A. CORP., ET AL.

Petitioners,

v.

BRYANT LAWSON, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* are the National Association of Manufacturers and the Chamber of Commerce of the United States of America, two organizations that represent the interests of millions of United States businesses.

The National Association of Manufacturers ("the NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The Chamber of Commerce of the United States of America ("the Chamber") is a non-profit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the

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[1] Pursuant to U.S. Sup. Ct. Rule 37.3(a), letters of consent by all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, the National Association of Manufacturers and the Chamber of Commerce of the United States of America state that this brief was not authored in whole or in part by counsel for any party in this matter, and that no person or entity other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief. In the interests of full disclosure, however, the NAM and the Chamber note that their counsel of record has represented the National Shooting Sports Foundation in connection with constitutional issues such as those discussed in this brief.

Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The NAM and the Chamber (together, "the *amici*") seek to promote and protect interstate commerce for their members by ensuring that, consistent with the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, individual States do not erect barriers to such commerce. The District of Columbia's Assault Weapons Manufacturing Strict Liability Act of 1990, D.C. Code § 7-2551.01 to 7-2551.03 (2001), is such a barrier. Accordingly, the *amici* respectfully request that this Court grant certiorari and invalidate the District of Columbia's Assault Weapons Manufacturing Strict Liability Act of 1990, D.C. Code § 7-2551.01 to 7-2551.03 (2001).

SUMMARY OF THE ARGUMENT

The Constitution explicitly grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States...." U.S. CONST. art. I, § 8, cl. 3. This Court has consistently interpreted this clause to mean what it says: that Congress alone has the power to regulate interstate commerce and that State laws may affect interstate commerce in nothing more than an incidental fashion. The District of Columbia's Assault Weapons Manufacturing Strict Liability Act of 1990, D.C. Code § 7-2551.01 to 7-2551.03 (2001) (the "Act"), contravenes these rules and, as a result, the decision below upholding the constitutionality of the Act should be reversed.

The Act imposes liability without fault upon companies that lawfully manufacture non-defective products in other States and sell them in interstate commerce. *See* D.C. Code § 7-2551.02. Because it encompasses only products that are illegal to manufacture or sell in the District, *see* D.C. Code § 7-2504.01 (2005), it necessarily applies only to out-of-State products that are illegally transported into the District by a

third-party and discharged there, causing an injury. Thus, conduct that may be legal in one State – the manufacture and sale of a firearm encompassed by the Act – is transformed into conduct that could subject manufacturers and sellers to absolute liability and unlimited damages in the District. In the end, the only way for a business to avoid liability under the Act is to abandon altogether the lawful manufacture and sale of the firearms covered by the Act anywhere in the United States.

The *amici* believe that the Act and the decision below have broad implications far beyond the firearms context in which they arose. The premise upon which the Act imposes liability – that the effects of out-of-jurisdiction conduct are felt within the District – can be applied to any transportable product. The business communities represented by the *amici* oppose this effects-based jurisdictional doctrine because, taken to its logical conclusion, it substantially dilutes – and tends towards abolishing – the Constitution's restrictions on State power over interstate commerce.[2]

The *amici* believe that the Act and the decision below, if left intact, would permit one State to impose rules making it unprofitable to conduct business outside that State – *i.e.*, throughout the rest of the nation. Alternatively, different States could impose a patchwork of conflicting regulations that would inhibit the ability to conduct business nationwide. The business communities represented by the *amici* do not believe that this vision of State power is consistent with the intent of the Framers of the Constitution.

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[2] Although the District is not a State, *amici* will refer to the District herein as if it were a State. *See* D.C. Code § 1-203.02 (2005) (Congress's grant of authority to the District was "subject to all the restrictions and limitations imposed upon the states" by article I, § 10 of the Constitution).

ARGUMENT

The Constitution delegated to Congress the power, *inter alia*, to regulate interstate commerce and restricted the power of the individual States to do so. Because the District's Act improperly regulates national commerce, this Court should review the decision below, invalidate the Act, and reverse.

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DISTRICT'S ACT BECAUSE IT REGULATES AND BURDENS COMMERCE OCCURRING ENTIRELY IN OTHER STATES

The Act upheld in the decision below is unconstitutional under the Commerce Clause. The Commerce Clause empowers only Congress to "regulate Commerce ... among the several States." U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has long held that the Commerce Clause limits the power of State and local governments to take actions affecting foreign and interstate commerce. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 326 n.1 (1989). In particular, this so-called "dormant Commerce Clause" restriction prohibits state governments from controlling commerce occurring wholly outside of their jurisdictions. *Id.* at 336, 337 n.14. The Supreme Court in *Healy* summarized the Commerce Clause's prohibition on such extraterritorial action as follows:

> First, the Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State. ... Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was

> intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.

491 U.S. at 336-37 (internal citations and quotations omitted). The Supreme Court has repeatedly condemned such extraterritorial action as *per se* unconstitutional. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) (striking as *per se* invalid a price affirmation statute requiring New York liquor sellers to charge prices no higher than those charged to customers outside New York; "[w]hile New York may regulate the sale of liquor within its borders, ... it may not ... [']regulat[e] the price' to be paid for liquor in those States"); *Edgar v. Mite Corp.*, 457 U.S. 624, 626-27, 643-46 (1982) (striking as *per se* invalid Illinois law allowing Illinois official to evaluate tender offer for shares of an Illinois company, regardless of existence of Illinois shareholders). The Act is *per se* unconstitutional under the dormant Commerce Clause, because it imposes liability upon out-of-State businesses for lawfully manufacturing and/or selling in those jurisdictions certain products of which the District disapproves.

The Commerce Clause gives to Congress and Congress alone the power to regulate the national market in products – whether those products are firearms, SUVs, or refrigerators. The explicit purpose of this delegation was to correct one of the most glaring failures of the Articles of Confederation: the imposition of laws by several States that impeded the interstate flow of commerce. *See Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (the Framers granted Congress plenary authority over interstate commerce in "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."); *see generally* The Federalist No. 42 (Madison), p. 267 (C. Rossiter ed. 1961) ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience").

The District's Act defies the Commerce Clause's limits on State power and necessarily assumes the national power delegated to Congress. Specifically, while the Act purports to impose "strict liability," the statute's language imposes absolute liability – *i.e.*, liability regardless of fault or defect – upon the manufacturers of certain types of firearms for any injuries caused by those firearms within the District. The firearms that fall within the broad sweep of this Act – firearms the District has chosen to define as "assault weapons" or "machine guns" – cannot lawfully be sold within the District, but they can be and are lawfully manufactured and sold in other jurisdictions. By so imposing liability without fault upon out-of-State manufacturers, the District's Act seeks to and does regulate commerce existing entirely outside the District's borders.

Thus, conduct that may be legal in one State – the manufacture and sale of a firearm encompassed by the Act – could nevertheless subject the manufacturer to absolute

liability and unlimited damages in the District whenever one of the manufacturer's products, through no fault of the manufacturer and solely because of the illegal conduct of criminals, is brought into the District and misused there. In the end, the only way for a manufacturer to avoid liability under the Act is to abandon altogether the lawful manufacture and sale of the firearms covered by the Act anywhere in the United States (or elsewhere) or, in the case of "assault weapons," to sell them only to law enforcement.[3] By forcing manufacturers to abandon or radically alter their commercial activities in other States, on pain of facing absolute liability and incalculable damages in the District, the District is directly regulating interstate commerce in violation of the dormant Commerce Clause.

While it purports to impose "strict liability," the Act goes far beyond the "strict liability" statutes and common law of other States, and imposes liability without proof of fault or defect. Under the common law of the District, as well as virtually every other jurisdiction, strict liability applies when a product "defect" causes an injury. *See, e.g., Webster v. Pacesetter, Inc.*, 259 F. Supp. 2d 27, 30 (D.D.C. 2003). In stark contrast to these strict liability principles, however, the Act does not require any proof of defect. Rather, the Act attaches liability to the out-of-State manufacture or sale of non-defective products of which the District disapproves. In short, the Act departs radically from the modern view of "strict liability" as reflected in the Restatement and the product liability law of many jurisdictions.

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[3] The Act contains an "exemption" stating that "[n]o assault weapon originally distributed to a law enforcement agency or a law enforcement officer shall provide the basis for liability under this subchapter." D.C. Code § 7-2551.03.

II. THE ACT HAS BROAD IMPLICATIONS FOR THE REGULATION OF NATIONAL COMMERCE THAT THIS COURT SHOULD ADDRESS AND CLARIFY

The implications of the Act and the decision below are enormous. While the Act relates specifically to firearms, the concept underlying the Act – imposing absolute liability upon disfavored out-of-State products – need not be restricted to firearms. Thus, if allowed to stand, the Act and the decision below could lead to similar product-based absolute liability statutes restricting commerce in any number of products. *See Healy*, 491 U.S. at 336 ("the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation"). The *amici* support the petition for certiorari because the decision below upholding the Act's constitutionality has important implications for the business communities the *amici* represent.

Over the last decade, States have been placing increased burdens upon interstate commerce. In particular, some States have tried to extend civil liability to conduct that occurs outside State borders, blocked only by this Court. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (invalidating State court punitive damage award based in part on out-of-State conduct); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) (same). The District's Act here, however, goes much further than the jury verdicts invalidated in *Gore* and *Campbell*. The Act imposes liability upon manufacturers and sellers of products that are illegal to manufacture and sell in the District, *see* D.C. Code § 7-2504.01, such that the Act necessarily imposes liability solely upon conduct that occurs

beyond the District's borders. Stated simply, the Act does nothing other than regulate out-of-State conduct.

If statutes regulating the out-of-State manufacture and sale of products were deemed constitutional, as the decision below concluded, national commerce in individual products could be stifled – even eliminated – because of the policy choices of a single State. Assume that State A imposed liability upon the manufacturers and sellers of widgets for any injuries caused there by widgets. Assume further that, like virtually any product, widgets can be transported – legally or illegally – into any jurisdiction, including State A. Much as widget manufacturers and sellers might actively avoid conducting business in State A because of the liability rules there, an unrelated third-party could still subject them to liability in State A simply by transporting the widget there. The only way for the businesses to avoid liability in State A would be for them to cease the manufacture or sale of widgets anywhere – all because of the policy choices of a single State. Under such a regime, individual States would wield enormous power to regulate the national economy.

For this reason, statutes such as the Act that regulate the out-of-State manufacture and sale of products also have important consequences for personal jurisdiction rules. Specifically, in an effort to avoid State A's liability rules, a manufacturer or seller may have decided not to "purposefully direct" its activities toward State A. *See, e.g., Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102, 112 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Notwithstanding such conscious decisions to avoid contacts with State A, statutes such as the Act purport to subject that manufacturer or seller to personal jurisdiction in State A simply because an unrelated third-party transported a product into the State, causing effects within State A. If in-State effects alone were sufficient to subject a manufacturer or seller to liability in State A, traditional understandings of

personal jurisdiction – as well as the due process notions that underlie them – would be eradicated. Every State would have the ability to regulate every business because of the possibility of in-State effects, notwithstanding the lack of "minimum contacts."

The obvious corollary to the foregoing is that, if each State had unlimited power to enact national rules, there could be several or many sets of such rules. Businesses could then face an unmanageable patchwork of inconsistent State regulations. *See, e.g., Granholm v. Heald*, 125 S. Ct. 1885, 1896 (2005) (discussing the current patchwork of State laws regarding shipments of out-of-State wine and stating that "[a]llowing States to discriminate against out-of-state wine invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause") (internal quotations omitted).

In short, the *amici* believe that State statutes regulating the out-of-State manufacture and sale of products – and the effects-based jurisdictional doctrine that inspires them – are unconstitutional. If the vision of State power articulated in the decision below were to stand, one State acting alone, or several States together, could make certain businesses completely unprofitable to conduct even outside the regulating States' borders.

CONCLUSION

To preserve the integrity of Congressional prerogative as the exclusive lawgiver in cases concerning the national economy and to protect the livelihood of all businesses, this Court should grant the petition, review the Act and strike it as unconstitutional. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRYANT LAWSON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The District Of Columbia Court Of Appeals

PETITIONERS' REPLY IN SUPPORT OF THEIR MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITIONERS' MOTION TO DEFER

Petitioners' motion seeks a brief deferral of this Court's consideration of their pending petition for certiorari, on the grounds that Congress is poised to pass legislation that will constitute an intervening legal development with direct and substantial bearing on this Court's disposition of the petition. *See* R. Stern, et al., SUPREME COURT PRACTICE § 5.9 at 311 (8th ed. 2002) ("[A] petition for certiorari may be held, without the Court's taking any action, until some event takes place that will aid or control determination of the matter."). The District of Columbia has not filed an opposition to the motion to defer.[1]

The individual respondents, however, oppose deferral on the basis that passage of the Protection of Lawful Commerce in Arms Act is uncertain. Brief in Opposition at 1-2. But uncertainty as to an intervening legal development by no means precludes deferral, as illustrated by *Trans World Airlines, Inc. v. Zipes*, where this Court granted a motion to defer pending the resolution of settlement proceedings. *See* 442 U.S. 916, 916 (1979) (order on deferral), 455 U.S. 385, 390 (1982) (decision on merits).

Notably, the individual respondents do not dispute that this case falls squarely within the plain language of S. 397. Nor do they contend that they would be prejudiced by a brief delay that would not extend beyond December 31, 2005 at the latest. Under these circumstances—and where the District of Columbia has not even filed an opposition to petitioners' motion—a brief deferral is warranted.

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[1] In fact, no respondent has filed a response to the petition itself. Accordingly, this Court may wish to request a response to the petition before taking any action.

CONCLUSION

For all the reasons set forth in petitioners' motion, and for all the reasons stated above, this Court should briefly defer consideration of the petition for certiorari in this case until the House acts on the bill and, if Congress passes the bill, until the President signs it into law or vetoes it.

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Dated: September 16, 2005